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No. _____

In The

Supreme Court of the United States

KANE FISHER AND SALVORS, INC., et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the admiralty right to salvage, and other user rights, are automatically invalidated upon the designation of a National Marine Sanctuary by Congress prior to the subsequent promulgation of rules and regulations for approval by Congress, and when applicable the State, that will govern the sanctuary and salvage activities upon taking effect?

II.

Whether a right of maritime salvage constitutes a federal law within the meaning of 16 U.S.C. § 1443 providing a "person may avoid liability" for injury to the sanctuary "caused by an activity authorized by federal or state law"?

LIST OF PARTIES

There were two consolidated cases in the District Court that were appealed to the Eleventh Circuit from one final judgment. The first case filed on April 21, 1992 was *United States v. Kane Fisher and Salvors, Inc.* (the other defendants were dismissed prior to final judgment). In the first case, a preliminary injunction was entered which was appealed to the Eleventh Circuit. The Eleventh Circuit's opinion is set forth in Appendix B. After remand, the second case was filed on August 3, 1995, *Motivation, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel.* The *in rem* defendant, the vessel, was a nominal party in the *in rem* admiralty action. The United States intervened.

Petitioners in this Court involving both cases are Kane Fisher, Salvors, Inc. and Motivation, Inc.

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OPINIONS BELOW

The recommendation of the magistrate and the order of the district court granting in part the government's request for preliminary injunction, unreported, are set out in Appendix "C" and "D," *infra*. The decision of the Eleventh Circuit affirming the preliminary injunction, *United States v. Fisher, et al.*, 22 F.3d 262 (11th Cir. 1994) is set out in Appendix "B," *infra*. The order of the district court granting partial summary judgment in favor of the government, holding no right to salvage existed, unreported, and is set out in Appendix "E," *infra*. The order of the district court granting a permanent injunction assessing damages for injury to 1.63 acres of seagrass and awarding the artifacts located, recovered and preserved by the salvors to the government, 977 F. Supp. 1193 (S.D. Fla. 1997), is set out in Appendix "F," *infra*. The final judgment of the district court, unreported, is set out in Appendix "G," *infra*. The Rule 36 affirmance by the Eleventh Circuit, unreported, is set out in Appendix "A," *infra*. The denial of the Petition for Rehearing, unreported, is set out in Appendix "H," *infra*.

STATEMENT OF JURISDICTION

The United States commenced an admiralty action on April 21, 1992, in the Southern District of Florida under 28 U.S.C. § 1333 against Melvin A. Fisher, Kane Fisher, Salvors, Inc. and three salvage boats. Motivation filed on August 3, 1995, an admiralty action in the Southern District of Florida under 28 U.S.C. § 1333 against an identified wrecked and abandoned vessel in which the United

States intervened on June 18, 1996. The two actions were consolidated in the district court and a final judgment was entered on September 5, 1997. A timely Motion for Rehearing was denied on October 16, 1997. Timely Notices of Appeal to the Eleventh Circuit were filed on November 13, 1997 by Salvors, Inc. and Kane Fisher, and on December 12, 1997 by Motivation, Inc. The decision by the Eleventh Circuit was entered on February 26, 1999. A timely Petition for Rehearing was denied on July 8, 1999. The Petition for Writ of Certiorari is being mailed this 4th day of October 1999. This Court has jurisdiction under 28 U.S.C. § 1254

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431 et seq., as amended, and the Florida Keys National Marine Sanctuary Act, 104 Stat. 3089 (1990) are set forth in Appendix I and J.

STATEMENT OF THE CASE

This case concerns two interrelated issues (1) the right of Congress and Florida, after public input, to approve regulations before the sanctuary may "take effect" and (2) the right of maritime salvage on the outer continental shelf during the multi-year interval between the designation of a National Marine Sanctuary and the effective date following the promulgation and approval of rules and regulations.

The Coffins Patch area in the Florida Keys off the coast of Marathon historically has been the subject of extensive salvage activity for remnants of the Spanish treasure fleet wrecked by a 1733 hurricane spawning litigation and literature (see for example *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp 311 (S.D. Fla. 1986), and Meylach, *Diving to a Flash of Gold*, Fla. Classic Lib. (1986 Ed). R8-31-241. This area is now encompassed in the Florida Keys National Marine Sanctuary, initially designated by Congress in 1990 and finally approved by Congress to take effect under 16 U.S.C. § 1434(b) on July 1, 1997, after adoption of changes to proposed regulations requested by Florida that included provisions for commercial treasure salvage. 62 F.R. 32154, 32161 (June 12, 1997).

During various days in January, February, and March of 1992, Defendants Kane Fisher and Salvors, Inc., using three boats, engaged in maritime salvage on the outer continental shelf in Coffins Patch. At the time of the 1992 salvage operations, no rules or regulations for the sanctuary existed. R5-185-12. The government admitted the Florida Keys Sanctuary Act provisions did not prohibit salvage. A permit was not required under the Archaeological Protection Act for the salvage activities for the outer continental shelf. 16 U.S.C. § 1470(b)(b). The salvors located, recovered, restored and maintained various artifacts.

The United States filed an admiralty action on April 21, 1992, seeking damages and an injunction preventing the Fisher defendants from conducting maritime salvage. The government moved for a preliminary injunction, and the defendants cross-moved for an injunction to restrain

the government from interfering with their salvage activities. No rules or regulations for the sanctuary to "take effect" had been submitted to Congress or the State of Florida, or even proposed at the time of the hearing. The district court referred the motions to a magistrate who, after a hearing, recommended that the district court issue a preliminary injunction restraining the defendants from using prop wash deflectors in conducting salvage operations in Coffins Patch but expressly allowing salvage activities to continue using "other salvage techniques." The magistrate further recommended that the court deny the defendants' request for an injunction. Pet.App. C. The district court adopted the magistrate's recommendation and issued a preliminary injunction, which allowed salvage to continue without the use of prop wash deflectors. Pet.App. D.

The Eleventh Circuit affirmed noting the "limited injunction prohibiting only the use of prop wash deflectors" in salvage operations. *United States v. Fisher, et al.*, 22 F.3d 262, 270 (11th Cir. 1994). Pet.App. B. A prop wash deflector or mailbox, one of several types of salvage tools, consists of an aluminum elbow shaped tube that directs the prop wash to the ocean floor to remove sand that may be covering articles of salvage.

As the basis for its 1994 ruling affirming the preliminary injunction, the Eleventh Circuit determined that submission to Congress and Florida by the Secretary of proposed rules and regulations was not required by the sanctuary act for the sanctuary to take effect. 22 F.3d 262, 267-269, Pet.App. B. Contra wise in 1997 proposed rules and regulations by the National Oceanic and Atmospheric Administration (NOAA), with changes requested

by Florida to **allow treasure salvage**, were submitted and approved in accordance with federal law, with an effective date of July 1, 1997. 62 F.R. 32154 (June 12, 1997).

Following the affirmance by the Eleventh Circuit of the preliminary injunction, Motivation, Inc. filed its *in rem* action against an unidentified, wrecked and abandoned vessel, seeking title and a salvage award for the same artifacts that the Fishers had recovered in Coffins Patch, Case Number 95-10051. On June 18, 1996, the district court allowed the United States (NOAA) to intervene. The court consolidated both cases for discovery and trial.

Based upon the prior decision of the Eleventh Circuit that submission of rules and regulations was not required, the district court granted partial Summary Judgment for the United States. The court ruled the Fishers had no right to have engaged in any salvage activity notwithstanding the preliminary injunction, which allowed salvage without using mailboxes, and notwithstanding that proposed rules and regulations had in fact been submitted to Congress and to Florida for approval. The court further ruled under 16 U.S.C. § 1443 that maritime salvage was not an "activity authorized by federal law." Pet.App. E, 48. The United States (NOAA) *in rem* claim against the three salvage boats had been dismissed. The only remaining issue then concerned liability and damages for injury to seagrass.

The court's ruling on Summary Judgment that there was no right to salvage by the Defendants was ruled dispositive of Motivation's claim for admiralty arrest and adjudication of title. Pet.App. F. As a result of the ruling,

the artifacts that had been recovered, restored and preserved by the Fishers, were awarded to the government and damages determined at the subsequent bench trial were awarded to NOAA of approximately $600,000 for injury to 1.63 acres of seagrass.[1] At the close of the government's evidentiary case, the court granted the motion to dismiss Defendant Melvin A. Fisher for failure of proof. Pet.App. F. The government's claim against Motivation was also dismissed. Pet.App. F.

The Eleventh Circuit's per curiam affirmance of the district court's final judgment avoided correction of its earlier opinion, at the preliminary injunction phase, that the Sanctuary Act did not require submission of proposed rules and regulations to Congress and to Florida in order for the sanctuary to take effect. Not only was the prior prediction proven to be factually wrong, and contrary to law, the very proposed rules and regulations were changed to accommodate Florida's objections. In essence,

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[1] Using the Habitat Equivalency Analysis authorized for oil spills, but not for admiralty claims of impact injury, and the retroactive application of various statutes and regulations, the district court awarded $351,648 for restoration, $211,130 for response costs under 16 U.S.C. § 1432(6)(C) and (7), and $26,533 for interest under 16 U.S.C. § 1443(a)(1)(B). R7-244-18, 19; R20-97-18, 19. The rules and regulations including the statutory provision for monetary costs and interest, 16 U.S.C. §§ 1432(6)(C) and 1443(a)(1)(B) used to award damages were not published or enacted until after all salvage activity had ceased and after the government's complaint was filed. There was no statutory provision for retroactivity. By comparison, the measure of damages for injury to seagrass under the Florida Statute § 376.121(5)(a), would have been $1 a foot or approximately $70,000.00.

the salvors were fined and their salvage confiscated for engaging in traditional and long standing salvage activities, now authorized by the 1997 regulations, and which had not been proscribed by any rule, regulation or statute in 1992.

The Eleventh Circuit denied a Petition for Rehearing, Pet.App. H, and this timely Petition follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. Public Importance.

The Secretary of Commerce (National Oceanic and Atmospheric Administration – NOAA, Designee) must submit proposed rules and regulations to Congress and to the relevant State before a National Marine Sanctuary can take effect. NOAA may not usurp Congress nor the sovereignty of the State by maintaining that such submission is a mere courtesy of no substantive import. Although the 1990 Keys Act was "in effect" or existence upon presidential signing, the implementation of regulations necessary for management and enforcement did not "take effect" until 1997. Maritime rights to salvage should not be automatically terminated by the mere designation of a National Marine Sanctuary. The holding below is contrary to the express mandates of the statute, its avowed purpose, and conflicts with decisions of this Court recognizing the existence of federal admiralty law. It even conflicts with the final regulations, which authorize procedures for commercial treasure salvage of submerged cultural resources.

The case is of substantial public interest because of the change in procedure for national marine sanctuaries in their designation and subsequent implementation of rules and regulations and because of the importance of recognizing maritime salvage as an activity authorized by federal law. The 1972 Marine Protection, Research and Sanctuaries Act contemplated a vast network of offshore areas under direct federal management. See 16 U.S.C. § 1431. Today, there are a dozen such sanctuaries in existence, with more being planned.

In previous years, the designation of a proposed sanctuary was by the Secretary of Commence. See 16 U.S.C. § 1433. At the time of designation by the Secretary, the proposed rules and regulations were submitted to Congress, and to the State whose lands and waters were involved, to take effect in the absence of objection after 45 days of continuous session of Congress. See id. § 1434(b)(1), Pet.App. J.

In recent years, instead of the Secretary designating marine sanctuaries, Congress has opted to designate them and require the Commerce Secretary (through the National Oceans and Atmospheric Administration (NOAA)) to complete the necessary regulatory process. Thus, after very lengthy consultations with the public and users of the proposed sanctuary, the Secretary promulgated proposed rules and regulations for approval by Congress and, when applicable, the respective State before the sanctuary may take effect.

The result, as in the case of the Florida Keys National Marine Sanctuary, was an interval of four to six or more years between designation by Congress and the date the

rules and regulations promulgated by the Secretary took effect. During this interval, Florida insisted upon changes to allow historic salvage operations to continue in the designated sanctuary area. (In a non-binding referendum the voters of Monroe County, the principal location of the sanctuary, rejected the proposed sanctuary 60% to 40%.) NOAA acquiesced to Florida's objections. See 62 F.R. 32154 (June 12, 1997).

The Eleventh Circuit had ruled the procedure mandated by Section 7 of the Florida Keys National Marine Sanctuary Act did not require submission of proposed rules and regulations to Congress and to Florida for approval under 16 U.S.C. § 1434(b) for the Sanctuary to "take effect" and for damages to be assessed by 16 U.S.C. § 1443.

The Eleventh Circuit's rulings contradict the history of the Florida Keys National Marine Sanctuary Act, which expressly recognized treasure salvage activities, and other user rights should be protected and allowed. The House Committee Report explicably recognized that rules and regulations were to be submitted. This Report, containing the statements of Congressman Fascel of Florida, the bill's co-author, is instructive:

> . . . The Management Plan that is implemented should enable those who make their livelihood from the reefs ***to continue to be able to do so.*** While the reefs as an ecological treasure, they are also a valuable economic recreational resource. For various cultural, historic and economic needs, activities such as commercial and recreational fishing and ***treasure salvaging must be allowed to continue*** responsibly where they

> will not cause damage to the reef itself. The consideration of the ***continuation of these activities*** must be a factor in the formulation of the management plan in a manner, which is consistent with the NMSP's mission.

Hearing, Committee On Merchant Marine And Fisheries, May 10, 1990, H.R. 3719, Serial No. 101-94, admitted Ex. 4, R8-31-149. [Emphasis Added]

The Eleventh Circuit, in upholding NOAA's argument that the submission of proposed rules is a discretionary superfluous act to the right of enforcement, repudiated the importance of federalism in the sharing of power between the United States and Florida in the management of resources as well as the right of the public for input. Besides input by sanctuary users, there is the due process importance of fair notice of what is and is not proscribed. There was no notice that maritime salvage was now illegal and unlawful and would subject salvors to substantial damage assessments and forfeiture of artifacts of salvage. Under the principle of separation of powers, the deprivation of existing rights of citizens by bureaucratic fiat, without any rules and regulations, needs the protection of the judiciary and warrants review by this Court.

The courts below further disregarded admiralty precedent in ruling that the 1992 maritime salvage activities were not authorized by federal law and thus not a defense to damage and property claims under 16 U.S.C. § 1443. This holding was made notwithstanding (1) that prior rights of maritime salvage had not been modified by any rule or regulation existing in 1992, and (2) that final rules, in accordance with State of Florida's objection,

recognized commercial treasure salvage activity existing prior to the effective date of July 1, 1997.

B. The Rulings Below, Contrary To Terms Of Statute, Allowed NOAA To Usurp Prerogatives Of Congress, Of The State Of Florida, And Of The Public.

The Fishers contended that the designation by Congress, instead of by the Secretary, still required, under the very wording of the Florida Keys Sanctuary Act, approval by Congress upon the expiration of the 45-day waiting period following publication **and** submission of the proposed regulations by the Secretary **and** the acceptance or rejection of changes requested by the State of Florida. Section 7(a) of the Florida Keys Sanctuary Act, 104 Stat. 3089, 3092, provided:

> SEC. 7(a) PREPARATION OF PLAN. – . . . The Secretary of Commerce shall complete such comprehensive management plan and final regulations for the Sanctuary not later than 30 months after the date of enactment of this Act. In developing the plan and regulations, the Secretary of Commerce **shall follow** the procedures specified in sections 303 and 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. §§ 1433 and 1434), **except** those procedures requiring the delineation of Sanctuary boundaries and development of a resource assessment report. [emphasis added]

Florida Keys National Marine Sanctuary and Protection Act, 104 Stat 3089, 3092 (1990).

Under Section 7(a), the difference between designation by Congress and by the Secretary was expressly

recognized. If by Congress, delineation of Sanctuary boundaries and assessment report were not required to be submitted – this was done by Congress in the designation. NOAA's argument in the prior appeal to the Eleventh Circuit contended 16 U.S.C. § 1434(b), Pet.App. J, did not require submission to Congress and Florida of proposed rules for the sanctuary to take effect. Contrary to the express language of Section 7(a), making § 1434 applicable (Section 304 of the Act of 1972), NOAA maintained that its interpretation of the Act was entitled to special deference. Brief of the United States (Appellee), 11th Cir. No. 92-4799 at 30, 32. Unfortunately, the Eleventh Circuit accepted NOAA's prediction and rejected Fisher's argument:

> These provisions show that the Florida Keys Act itself established the Florida Keys Sanctuary and did not require any further action by the Administration for the sanctuary to come into existence.
>
> . . .
>
> Although the Florida Keys Act requires the Secretary to develop, with public participation, a management plan for the Florida Keys Sanctuary, there was no reason for Congress itself to review that plan after the statute became effective, and no indication that Congress reserved that right. Indeed, in view of the Congressional concern over effectively protecting the Florida Keys Sanctuary that led Congress in the Florida Keys Act itself to create the sanctuary, it is difficult to believe that Congress would have delayed implementation of the sanctuary for the 30 months the Secretary had to promulgate a management plan. This 30-month period stands

> in sharp contrast to the 45 days that Congress has to review and possibly disapprove the Secretary's designation of a sanctuary under the Sanctuaries Act.

Fisher, 22 F.3d, at 267 and 268, Pet.App. B, 14-15.

The federal law, as now promulgated in the Federal Register, proves that NOAA's prediction was wrong and that Fishers' contention was correct. Indeed the thirty-month period was extended to over six and one-half years. The Federal Regulations were submitted by NOAA to Congress after complying with the provisions of the Florida Keys Sanctuary Act, including § 1434(b). The Federal Regulations as duly promulgated are now federal law, including the modifications made after the objection by the State of Florida and acceptance by NOAA relating to the protection of commercial treasure salvage rights. 62 F.R. 32154, 32160, 32161 (June 12, 1997).

NOAA's arguments to this Eleventh Circuit in the prior appeal on the preliminary injunction mislead the lower courts into making predictions that NOAA knew were incorrect. NOAA's counsel argued one position to the court – even contending Fisher's argument was absurd,[2] and then NOAA turned around as acknowledged in the federal regulations, and did exactly the

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[2] NOAA argued to the Eleventh Circuit:

> The absurdity of the Fishers' argument is illustrated by their contention that upon promulgation of the management plan, the designation of the Florida Keys National Marine Sanctuary must be resubmitted to Congress for forty-five legislative days before taking effect. First, the forty-five day period required in 16 U.S.C. § 1443

opposite with Congress. When confronted with the reality that the rules were submitted, NOAA then successfully contended that the submission was a mere accommodation.[3]

The Governor of Florida's objections and requested changes were made because of the need to protect the treasure salvors industry in the Florida Keys. 62 F.R. 32154, 32160 and 32161 (June 12, 1997). Recognition that "treasure salvaging must be allowed to continue," as set forth in the House Report quoted, *supra*, p. 8, was embodied in the State of Florida's objection that NOAA acceded to for implementation in the entire sanctuary.

> During the forty-five day review period the governor submitted to the Secretary of Commerce a certification that implementation of the specific amendments were made to the regulations. In response to the Governor's certification, NOAA amended those regulations certified

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> begins from the notice of designation: even if Congress had intended the Sanctuary Act to be a mere "notice of designation," this period already has passed. Second the statutory delay is intended to provide Congress with an opportunity to review, and possibly veto, an administrative designation; Congress had no need for a "waiting period" to review a law passed by both Houses and signed by the President.

NOAA's Brief, No. 92- 4799, at 39.

[3] Brief of United States, 11th Cir. No. 97-5800, pp. 30-32:

> "In sum, Fisher's argument that the Sanctuary designation by Congress in 1990, may only take effect after NOAA has published regulations for the Sanctuary is without merit." Id. at 31.

> as unacceptable to incorporate the Governor's changes. Consequently, upon their effective date the regulations, as modified by this notice, and management plan, in their entirety, will apply throughout the **Sanctuary**, including within State waters of the **Sanctuary**.

62 FR 32154 (June 12, 1997)

Florida objections specifically recognized the obligation of the Secretary to submit proposed rules under § 1434(b).[4] These regulations now provide for issuance of salvage permits for new salvage activities as well as recognizing preexisting salvage rights.[5] The Eleventh Circuit graciously suggested that the Fishers should have applied for a permit. *Fisher*, 22 F.3d at 269, 270, Pet.App.

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[4] In accordance with subsection 304(b)(1) [16 U.S.C. § 1434(b)] of the National Marine Sanctuaries Act and that resolution, the following terms are certified as unacceptable in state waters:

62 FR 32155 (June 12, 1997)

> WHEREAS, the management plan development period was extended to six years to provide the maximum opportunity for participation by all segments of government, industry, and the citizens of Florida and the United States; and
>
> WHEREAS, Memoranda of Agreement of the Florida Keys through a cooperative partnership have been developed and included in the management plan, including the:
>
> . . . (3) Submerged Cultural Resources Agreement

62 FR 32156 (June 12, 1997)

[5] 15 C.F.R. § 922.167 Certification of preexisting leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity. 62 F.R. 32169

B, 19-20. However, NOAA admitted there were no rules or regulations authorizing a permit in 1992.[6] In negating the principals of federalism that recognize Florida's role, the court glossed over separation of powers and the duty of the legislature to enact law and the duty of the judiciary to protect the rights of citizens from well meaning but arbitrary and capricious bureaucratic acts. Enforcement should follow, not precede, enactment of rules and regulations. The contrary view of the Eleventh Circuit and NOAA deserve scrutiny by this Court.

C. The Ruling Below Conflicts With This Court's Holdings That Salvage Is Authorized By Federal Law.

This case comes as a consequence of nearly three decades of litigation involving access to historic shipwrecks off the Florida coast, a matter to which this Court's attention has been previously drawn. All of the cases relied upon by the courts below involved salvage where a permit was required under existing laws and regulations. The courts ignored directly relevant salvage cases (even involving related parties) upholding salvage rights on the Outer Continental Shelf. *Florida Department*

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[6] Testimony of Bill Causey the sanctuary manager.

Q: Isn't it true in January of 1992 there were no written procedures in effect for issuing permits?

A: That's true.

Q: Okay. Didn't you also tell Mel Fisher that N.O.A.A. was not writing permits at that time?

A: That's correct.

R12-226-130, 131.

of Insurance v. Treasure Salvors, 458 U.S. 670 (1982). See also *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978) (rejecting claim of the United States to articles of salvage). *MDV Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 631 F. Supp. 311 (S.D. Fla. 1986) (involving the same area of Coffins Patch as the instant case).

The ruling below "that the Government has established as a matter of law that the Defendants had no preexisting salvage rights in the Florida Keys Sanctuary" (Pet.App. F, 54) conflicts with these rulings unless the mere act of designation without rules abolished all salvage rights.

The Florida Keys Act does not preclude any preexisting lawful activity by its express terms, except for certain designated matters, none of which could be construed to mean maritime salvage.[7] At the time of the 1992 salvage activity in question, the government admitted at trial that the Florida Keys Sanctuary Act did not bar salvage, and acknowledged that no regulations in the Florida Keys

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[7] Under 6(b) mineral and hydrocarbon leasing, exploration, development and production were immediately barred. Section 6(a), 104 Stat. 3091-3092 expressly prohibited certain vessel traffic activity effective with new charts or. . . . *Other uses were subject to future regulations* that were to be recommended in the Management Plan, Section 7, 104 Stat. 3092-93 and Section 9, 104 Stat. 3094. Pet.App. I.

National Marine Sanctuary then existed for purposes of preventing or regulating salvage.[8]

NOAA contended, and the courts below agreed, that even without any rules, regulations, or final approval by Congress and Florida for the Florida Keys National Marine Sanctuary to "take effect," that damages were mandated by 16 U.S.C. §§ 1437 & 1443 of the Marine Sanctuary Act of 1972. To the contrary, even if the general sanctuary provisions were fully applicable to the Florida Keys Sanctuary in 1992 prior to any approval of its rules and regulations, there still would be no liability because the maritime salvage was then lawful activity that had not been modified or restricted until the 1997 regulations became effective.

The courts below expressly noted, but failed to properly apply, 16 U.S.C. § 1443(a)(3).

> A person is not liable under this subsection if that person establishes that –
>
> . . .
>
> (B) the destruction, loss or injury was caused by an activity authorized by Federal or State law. . . .

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[8] Ole Vermer, the designated representative of NOAA, testified at trial:

> Q: And I think you've already stipulated no regulation prohibited the prior lawful activity of salvaging?
>
> A: I said the Florida Marine Sanctuary Protection Act did not expressly prohibit commercial salvage.

R16-235-39.

The district court erred in not recognizing that the maritime salvage law is federal law. A prior right to salvage under admiralty law existed ("an activity authorized by Federal . . . law"). Admiralty law is part of the law of the United States. See *Romero v. International Terminal Operating Co.*, 4 U.S. 354 (1959) (Admiralty or maritime law is expressly provided under Article III of the Constitution). Admiralty jurisdiction was the cardinal reason why the Constitution provided for the existence of federal courts. With deference to the courts below, there should have been no doubt that maritime law is a federal law under *Romero* and earlier Supreme Court cases.

Today, there is no room for any doubt that maritime salvage law is an aspect of federal law. See *California State Lands v. Deep Sea Research*, 118 S.Ct. 1464 (1998) which involved jurisdiction in *in rem* salvage actions where a state had interposed a claim over the *res*. Although this appeal does not involve the Eleventh Amendment, it does implicate whether maritime salvage law is a body of federal law.

> The judicial power of federal courts extends "to all Cases of admiralty and maritime Jurisdiction." Art. III, § 2, cl. 1. The federal courts have had a unique role in admiralty cases since the birth of this Nation, because "[m]aritime commerce was . . . the jugular vein of the Thirteen States." F. Frankfurter & J. Landis, The Business of the Supreme Court 7 (1927). Accordingly, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." Ibid. The constitutional provision was incorporated into the first Judiciary Act in 1789,

> and federal courts have retained "admiralty or maritime jurisdiction" since then. See 28 U.S.C. § 1333(1).

Id., at 1470.

Under 16 U.S.C. § 1443(a)(3)(B), there is no liability for damages "caused by an activity authorized by federal . . . law", and maritime salvage is an integral part of federal admiralty law. This should have ended the matter and NOAA's claim should have been dismissed. The court of appeals and United States would rewrite the statute to read: there is no liability for damages *only if the activity was expressly authorized by NOAA*. The text of the existing statute is plain, clear, and unambiguous. No regulations existed at the time (1992) prohibiting maritime salvage. Indeed, the current regulations (from 1997) provide procedures to obtain a permit to continue to engage in such salvage activities, based on rights and usage prior to July 1, 1997, not 1990, the date the Keys Act was signed.

Under decisions by this Court governing statutory construction, the intent to exclude maritime salvage from being considered federal law, a meaning literally satisfying the plain language of the statute, must be "clearly expressed." The inquiry begins with the language of the statute, see *Ardestani v. INS*, 502 U.S. 129, 135 (1991) which "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-36 (citation omitted) (quoting

Rubin v. United States, 449 U.S. 424, 430 (1981). In the absence of that rare and exceptional circumstance, "we are bound to take Congress at its word." *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838, 841 (1998).

The government contended below that the statute § 1443 is to be narrowly construed in accordance with the provisions' Congressional history. The House Report states:

> This defense is intended to be construed narrowly, and the authorization giving rise to the defense must be for the specific activity giving rise to the damage. Thus, where a vessel runs aground within a sanctuary, it cannot use this defense to assert that the license to operate within the territorial waters of the United States entitles it to a defense because the authority to operate in territorial waters does not constitute the authority to run aground within a marine sanctuary.

House Report 100-739 (100th Cong. 2d Series), June 8, 1988, p. 22.

Using the illustration contained in the report, a maritime salvage would come within the statute. Unlike a vessel that has run aground – activity not authorized by maritime law, the salvage operation using mailboxes to remove overburden (causing injury to seagrass) to locate and recover artifacts is the very essence of maritime salvage activity regarding ancient shipwrecks. Salvage of shallow shipwrecks, particularly ancient wooden vessels, unlike deep water wrecks, is complicated because the succession of storms and currents continually cover and uncover the scatters of the vessel remains and cargo from

the time of its initial breakup from first striking a reef during a hurricane until the present. Salvors looked to find a line of scatter buried under the sand or mud to lead to a primary deposit or major portion of the vessel's remains or cargo. Magnotometers, airlifts, sonar, and mailboxes are used to locate and recover items. See Meylach, *Diving to a Flash of Gold*, Fla. Classic Lib. (1986 Ed). R. 8-31-241.

The history of the statutory provision "activities authorized by federal law" does not excise maritime salvage from inclusion as "federal law." Indeed, in addition to general federal maritime law regarding salvage, Congress, by statute, 46 U.S.C. § 722, has provided specific recognition of salvage off the Florida coast:

> All property, of any description whatsoever, which shall be taken from any wreck, from the sea, or from any of the keys and shoals within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction of the United States.

The admiralty courts even have promulgated special standards for arrest and salvage of historic wrecks. See, e.g., *Cobb Coin Co. v. Unidentified Wreck*, 549 F. Supp. 54 (S.D. Fla. 1982).

The Archaeological Resources Protection Act expressly excludes the salvage area on the "Outer Continental Shelf," at issue in this case, from the requirement of a permit to engage in maritime artifact recovery. 16 U.S.C. § 470(b)(b). This is where the salvage occurred.

Petitioners do not doubt that Congress has the right to modify general admiralty law. The courts below erred, however, by misstating the issue. The question is not whether Congress could regulate maritime salvage, but rather had Congress in fact done so in reference to salvage activities in this case. Congress had not.

Litigation regarding the effect of sanctuary published rules and regulations on pre-existing rights have been contentious. In *Craft v. National Park Service*, 34 F.3d 918 (9th Cir. 1994), the Ninth Circuit implicitly held that the defenses to civil liability under 16 U.S.C. § 1443(a)(3), were to be broadly construed and gracious towards pre-existing uses of marine sanctuary resources, especially when such uses were consistent with federal law. See id. at 922-23. To that extent, there is at least a tacit conflict in circuit authority on the issues raised here regarding enforcement rights prior to existence of published regulations.

Additionally, Petitioners would note that analogous issues of state and federal regulatory authority for maritime activities are currently before the Court in *United States v. Locke* and *Int'l Assoc. Of Independent Tanker Owners v. Locke*, cert. Granted, Docket Nos. 98-1701 & 98-1706, 1999 WL 128655 (Sept. 10, 1999) (reviewing *INTERTANKO v. Locke*, 148 F.3d 1053 (9th Cir. 1998)). Although the Petitions in those cases primarily focus on the preemptive effect of federal legislation over state regulation in the maritime field, the concern presented here (interpreting the marine sanctuaries legislation as consistent with both State regulatory interests and the traditional contours of the general maritime law) is certainly relevant.

National marine sanctuaries such as the Florida Keys affect activity of countless citizens, including those whose livelihoods are directly governed. At issue here is the Eleventh Circuit's ostensible rejection of principles of federalism. At stake is the right of Congress, and of a State, to control fiat by a governmental agency. The Eleventh Circuit and NOAA's contention that the approval process is a discretional courtesy negates those values and rights. The ruling rejecting maritime salvage, not otherwise prohibited, as a federal law under 16 U.S.C. § 1443, is inexplicable in view of holdings by this Court on admiralty.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Court Decision Affirming Under Rule 36, February 26, 1999, *United States v. Fisher, et al.* and *Motivation, Inc. v. Unidentified Wreck* (11th Cir. No. 97-5800)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5800

(Filed Feb. 26, 1999)

D. C. Docket No. 92-10027-Civ-EBD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KANE FISHER, SALVORS, INC., a Florida Corporation, in personam,

Defendants-Appellants.

D. C. Docket No. 95-10051-Civ-EBD

MOTIVATION, INC., a Delaware Corporation,

Plaintiff-Counter-
Defendant-Appellant,

versus

UNIDENTIFIED, WRECKED AND ABANDONED VESSEL, her tackle, armament, apparel, and cargo located in the Atlantic Ocean within a circle with a radius of 1,000 yards of a point located at 24 41′ 30″ North Latitude and 080 56′ 18″ West Longitude,

Defendant.

Appeals from the United States District Court for the Southern District of Florida

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(February 26, 1999)

Before EDMONDSON, COX and BIRCH, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

APPENDIX "B"

Opinion Affirming Preliminary Injunction, *United States v. Fisher, et al.*, 22 F.3d 262 (11th Cir. 1994)

22 F.3d 262
38 ERC 1878
(Cite as: 22 F.3d 262)

UNITED STATES of America, Plaintiff-Appellee,

v.

Melvin A. FISHER, Kane Fisher, Salvors, Inc., a Florida Corporation, in personam, M/V BOOKMAKER, M/V TROPICAL MAGIC, their engines, apparel, tackle, appurtenances, stores and cargo, in rem, Defendants-Appellants, M/V DAUNTLESS, Defendant.

No. 92-4799.

United States Court of Appeals,
Eleventh Circuit.

June 3, 1994.

David P. Horan, Key West, FL, for defendants-appellants.

Southern District of Florida.

Before HATCHETT and EDMONDSON, Circuit Judges, and FRIEDMAN*, Senior Circuit Judge.

FRIEDMAN, Senior Circuit Judge:

This is an appeal from an order of the United States District Court for the Southern District of Florida preliminarily enjoining the appellants from violating the Marine Protection, Research, and Sanctuaries Act ("Sanctuaries Act"), 16 U.S.C. §§ 1431-45, and the Florida Keys National Marine Sanctuary and Protection Act ("Florida Keys

---

* Honorable Daniel M. Friedman, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Act"), Pub.L. No. 101-605, 104 Stat. 3089 (1990), by conducting certain marine salvage operations. We hold that the district court did not abuse its discretion in granting the preliminary injunction and therefore affirm.

A. The Statutory Scheme

Congress enacted the Sanctuaries Act in response to a "growing concern about the increasing degradation of marine habitats." S.Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4387. The Sanctuaries Act

> provides for the protection of important and sensitive marine areas and resources of national significance through the establishment of marine sanctuaries. The purpose of these sanctuaries is to preserve or restore such areas for their conservation, recreational, ecological, or aesthetic value.

Id.; *see also* 16 U.S.C. § 1431.

The statement of the "Purposes and policies" of the Act includes:

> (2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will complement existing regulatory authorities;
>
> (5) to facilitate, to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.
>
> If the Secretary determines that there is an imminent risk of destruction or loss of or injury

> to a sanctuary resource, or that there has been actual destruction or loss of, or injury to, a sanctuary resource which may give rise to liability under section 1443 of this title, the Attorney General, upon request of the Secretary, shall seek to obtain such relief as may be necessary to abate such risk or actual destruction, loss or injury, or to restore or replace the sanctuary resource, or both. The district courts of the United States shall have jurisdiction in such a case to order such relief as the public interest and the equities of the case may require.

16 U.S.C. § 1431(b).

The Sanctuaries Act gives the Secretary of Commerce ("Secretary") the authority to designate and manage marine sanctuaries and to specify in such designation the regulatory requirements for the particular sanctuary. 16 U.S.C. § 1433. The Secretary has delegated these responsibilities to the Department's National Oceanic and Atmospheric Administration ("Administration"). S.Rep. No. 595, 1988 U.S.C.C.A.N. at 4387-88.

The statute defines "sanctuary resource" broadly to mean

> any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary.

16 U.S.C. § 1432(8).

The Act specifies the procedures the Secretary must follow in designating a marine sanctuary. In "proposing to designate a national marine sanctuary," the Secretary

must provide a management plan, an environmental impact statement, and other documents to accompany the notice of proposed designation. 16 U.S.C. § 1434(a)(1). The documentation is first provided in draft form for public comment by publication in the Federal Register and to the appropriate committees of both Houses of Congress. *Id.* Final documentation is published in the Federal Register and provided to Congress. 16 U.S.C. § 1434(b). The sanctuary designation "takes effect" forty-five days after the Secretary issues the final "notice of designation." The forty-five day period allows Congress the opportunity to disapprove "any of [the designation's] terms." *Id.*

The Secretary is authorized to "conduct such enforcement activities as are necessary and reasonable to carry out this [Sanctuaries Act]." 16 U.S.C. § 1437(a). Under 16 U.S.C. § 1443(a)(1),

> [a]ny person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for response costs and damages resulting from the destruction, loss, or injury.

The statute also provides for judicial equitable relief:

16 U.S.C. § 1437(i).

In addition to the designation of marine sanctuaries by the Secretary, Congress itself has designated sanctuaries. In the Florida Keys Act, Congress "designated as the Florida Keys National Marine Sanctuary under title III of the [Sanctuaries Act] [the area involved in this case]. The Sanctuary shall be managed and regulations enforced under all applicable provisions of such title III as if the Sanctuary had been designated under such title."

Florida Keys Act § 5(a). The stated "purpose of this Act is to protect the resources of the [Florida Keys National Marine Sanctuary]." *Id.* § 3(b). Among the Congressional findings in the Act are that "spectacular, unique, and nationally significant marine environments, including seagrass meadows" are located adjacent to the "Florida Keys land mass" (*id.* § 2(2)) and that "[t]hese marine environments are subject to damage and loss of their ecological integrity from a variety of sources of disturbance." *Id.* § 2(5).

The Florida Keys Act requires a number of planning activities, coupled with public participation requirements, which parallel those in the Sanctuaries Act. For example, the Administration is directed to develop a comprehensive management plan for the sanctuary within 30 months to "facilitate all public and private uses of the Sanctuary consistent with the primary objective of Sanctuary protection." *Id.* § 7(a)(1). The Environmental Protection Agency is directed to prepare a comprehensive water quality protection program for the sanctuary. *Id.* § 8(a). The Administration is required to establish an intergovernmental advisory council to assist in the development and implementation of the management plan for the sanctuary. *Id.* § 9(a).

Both the Sanctuaries Act and the Florida Keys Act were later amended by the Oceans Act of 1992, which became effective after the injunction in this case. Pub.L. No. 102-587, 106 Stat. 5039 (1992). Among other provisions, the Oceans Act strengthens the liability and enforcement provisions of the Florida Keys Act; provides additional authority and resources to the Environmental Protection Agency to conduct monitoring programs in the

sanctuary; and designates three additional national marine sanctuaries. *Id.*

B. The Present Case

The appellants are maritime salvors. This case arises out of their conduct of salvaging operations involving the use of devices known as "prop wash deflectors," in an area known as Coffins Patch, which the Fishers stipulated "is entirely within the boundaries of the [Florida Keys Sanctuary]."

Prop wash deflectors, also known as "mailboxes," are used to direct propeller wash to remove seabed sediments and expose underlying materials. The Fishers stipulated that they used those deflectors in Coffins Patch "to remove overburden, sediments, and seagrass in which artifacts are contained," and had removed historic artifacts from Coffins Patch. The Fishers also stipulated that, while using prop wash deflectors in Coffins Patch, they had "created at least 100 depressions" in the seabed.

The United States filed a complaint against the appellants (the two Fishers, a corporation they own and control that "specializes in marine salvage and treasure hunting" [collectively, the Fishers] and three vessels used in their salvage operations). It sought damages and injunctive relief "arising out of defendants willfully destroying, causing the loss of, and injuring sanctuary resources, many of which are irreplaceable" in the Florida Keys sanctuary through their use of prop wash deflectors. It also sought forfeiture of the three vessels. The United States also sought a preliminary injunction to restrain the Fishers "from further dredging or salvage activities

within the Florida Keys National Marine Sanctuary until trial or other disposition of the merits of this action." The Fishers cross-moved for an injunction to restrain the government from interfering with their activities.

The district court referred the motions to a magistrate judge. Extensive expert and other testimony describing the injury the Fishers' prop wash deflectors had inflicted on the sanctuary was introduced at a hearing before the magistrate judge.

The government presented expert testimony that the sanctuary had been irreparably injured. The testimony described the damage done to the seagrass and the coral reef ecosystem. The experts explained that the seagrasses were required to stabilize the sea bottom and preserve water quality. The testimony included a damage survey of at least 27 craters in Coffins Patch that were more than 30 feet across and more than 80 feet deep. The lack of algal growth established that these were recent excavations. The length of the grass blades and the rhizome system indicated that prop wash deflectors had been used. The experts also described the damage to fans, sponges, and historic artifacts unearthed by prop wash deflectors.

The experts described the destructive effects of prop wash deflector use, which included the following: (1) the sites would not reestablish themselves; (2) the displaced sediment buried seagrass to lethal depths; (3) the craters led to continuing erosion and destruction of the seagrass ledge; and (4) the absence of substrate and fill for craters precluded revegetation. These experts confirmed that the damage had been recent.

Eyewitnesses testified that all three of the Fishers' vessels in Coffins Patch were using prop wash deflectors. One eyewitness testified that several times a week he saw only the Fishers using those deflectors in the area of damage.

Some of the Fisher's own evidence was consistent with the government's. For example, one witness for the Fishers acknowledged the destructive potential of prop wash deflectors. Kane Fisher confirmed that only the Fishers had been using prop wash deflectors in Coffins Patch during the time when the damage was done to the sanctuary.

The magistrate judge filed a report recommending that the government's motion for a preliminary injunction be granted. The magistrate judge first held that the government was "substantially likely to prevail on its § 1443 claim against the defendants." He ruled that "[t]o prevail on its § 1443 claim, the government must show simply that the defendants have injured sanctuary resources." He stated that it was "undisputed" that the Fishers used prop wash deflectors in the sanctuary, that such use created at least 100 depressions in the area and that

> persuasive testimony by Dr. Joseph Zieman indicates that these depressions have injured and disrupted vital seagrass environments in the Sanctuary. (Transcript at 84-92.) This seagrass, anchored on the ocean's bottom, is an integral part of the coral reef ecosystem and serves as shelter, food, and habitat for myriad life forms present in the Sanctuary. Dr. Zieman testified that "regrowth of that grass is probably

> not going to occur within our life times." (*Id.* at 90.) (footnote omitted.)

The magistrate judge held that "the injured seagrass environments are clearly 'sanctuary resources' under the MPRSA. 16 U.S.C. § 1432(8). The Sanctuary Act expressly refers to the protection of 'seagrass meadows.' Sanctuary Act, §§ 2(2), 2(3). There is little dispute that seagrass beds contribute to conservation, recreational, ecological, research, educational, and aesthetic values, as intended by the Sanctuary Act. *Id.*" The magistrate judge rejected the Fishers' argument that under the Sanctuaries Act and the Florida Keys Act, the Florida Keys Sanctuaries had not yet been established and that the prohibitions of the Sanctuaries Act therefore were not operative there.

The magistrate judge held that irreparable injury would result if the Fishers' activities were not preliminarily enjoined and that a preliminary injunction would serve the public interest. The magistrate judge concluded, however, that "[t]he injunction sought by the government, barring the defendants from all salvage activities in the Sanctuary, is overbroad and unsupported by the evidence." Since the "government has only shown damage to the Sanctuary from the defendants' use of prop wash deflectors . . . an injunction barring the defendants from employing prop wash deflectors would be sufficient to ensure that the Sanctuary is not further damaged. This injunction should not bar the defendants from pursuing their livelihood by using other salvage techniques in the Sanctuary area."

The district court, "[b]ased upon the Magistrate's recommendation, and after independent review of the

record," issued a preliminary injunction against the Fishers, and denied their motion.

II

A "preliminary injunction will be reversed only if the trial court clearly abused its discretion." *GSW, Inc. v. Long County, Georgia*, 999 F.2d 1508, 1518 (11th Cir.1993). To obtain a preliminary injunction, the government must prove: (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that the injury to the government from denial of injunctive relief outweighs the damage to the other party if it is granted; and (4) that the injunction will not harm the public interest. *GSW, Inc.*, 999 F.2d at 1518.

The Fishers make no attempt to show that in granting a preliminary injunction, the district court misapplied these four factors. They argue only that the statutory provisions involved are not operative in the Florida Keys Sanctuary, and that, in any event, those provisions cannot be applied to them. Indeed, their briefs read like an appeal from a final judgment, not from a preliminary injunction.

These arguments presumably are directed to the magistrate judge's ruling on the first of the four relevant factors – that the government is substantially likely to prevail on the merits. The argument apparently is that since the statute does not apply to the Fishers' conduct, not only is the government not likely to prevail on the merits, but that it cannot possibly do so. As the Fishers have structured their argument, they have waived any

challenge to the magistrate judge's ruling on the three other factors. Accordingly, we shall address only the merits of the government's positions.

A. The Fishers' principal contention is that the Florida Keys Sanctuary will not become an existing entity until the Secretary has promulgated a management plan for that sanctuary, which he has not done, and that the statutory provisions they are charged with violating are inoperative in the sanctuary and, therefore, cannot be applied to them.

The Fishers rely on § 1434(b) of the Sanctuaries Act, which provides that the Secretary's designation of a marine sanctuary "takes effect" 45 days after the Secretary has issued his final "notice of designation." They point out that the Florida Keys Act requires the Administration to promulgate a management plan for the Florida Keys Sanctuary within 30 months, and argue that the Congressional designation of the sanctuary, like the Secretary's designation of other sanctuaries, does not "take effect" until the management plan for it has been promulgated.

Unlike § 1434(b) of the Sanctuaries Act, however, there is nothing in the Florida Keys Act that states that Congressional designation of the Florida Keys Sanctuary does not "take effect" until the Administration has promulgated a management plan for that sanctuary. To the contrary, the language of the Florida Keys Act indicates that the Congressional designation of that sanctuary was effective on the effective date of the Act.

The caption of the Florida Keys Act describes it as an Act "[t]o establish" the Florida Keys National Marine

Sanctuary. The Congressional findings include the statement that "[a]ction is necessary to provide comprehensive protection for these marine environments by establishing a Florida Keys National Marine Sanctuary . . . " Florida Keys Act § 2(7). Section 5(a) of the Act, captioned "DESIGNATION," provides that the described area "is designated as the Florida Keys National Marine Sanctuary . . . [and] shall be managed and regulations enforced under all applicable provisions [of the Sanctuaries Act] as if the Sanctuary had been designated under such title." Florida Keys Act § 5(a).

These provisions show that the Florida Keys Act itself established the Florida Keys Sanctuary and did not require any further action by the Administration for the sanctuary to come into existence. "It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 111 S.Ct. 840, 846, 112 L.Ed.2d 919 (1991). Here, as in *Gozlon-Peretz*, "[w]e find no such contrary directions in the language of [the statute] or in its evident purpose." *Id.*

There is a sound practical reason why, in the Florida Keys Act, Congress designated the Florida Keys Sanctuary effective immediately and did not delay the effectiveness of the designation for a stated period, as it did in sanctuaries designated by the Secretary under the Sanctuaries Act. In the latter situation, the 45-day delay of the taking effect of the Secretary's designation was designed to give Congress the opportunity to disapprove "any of [the designations] terms," (16 U.S.C. § 1434(b)) and the public the opportunity to make its views known. Where, however, Congress itself made the designation, there was

no need or occasion for such delay. The public already has had the opportunity to comment upon the legislation while it was pending before Congress, and Congress fully considered the terms of the designation before the Act was enacted.

Although the Florida Keys Act requires the Secretary to develop, with public participation, a management plan for the Florida Keys Sanctuary, there was no reason for Congress itself to review that plan after the statute became effective, and no indication that Congress reserved that right. Indeed, in view of the Congressional concern over effectively protecting the Florida Keys Sanctuary that led Congress in the Florida Keys Act itself to create the sanctuary, it is difficult to believe that Congress would have delayed implementation of the sanctuary for the 30 months the Secretary had to promulgate a management plan. This 30-month period stands in sharp contrast to the 45 days that Congress has to review and possibly disapprove the Secretary's designation of a sanctuary under the Sanctuaries Act.

In the Florida Keys Act, Congress did not merely itself designate, in place of a "notice of designation" by the Secretary, a particular sanctuary. Instead, it provided that the sanctuary "is designated" and should be treated as if it "had been designated" under the Sanctuaries Act. Florida Keys Act § 5. Congress thus adopted a different procedure than it had provided for sanctuary designations by the Secretary.

The President so recognized when he signed the Florida Keys Act. In his accompanying statement, the President noted that Congress was "bypassing" the "usual

process" of "designating after adherence to the comprehensive evaluation and designation procedures set forth in the [Sanctuaries Act]." Statement by President George Bush Upon Signing H.R. 5909, 26 Weekly Comp.Pres.Doc. 1829 (Nov. 19, 1990), reprinted in 1990 U.S.C.C.A.N. 4393-2. The President stated that Department of Commerce studies supported the designation, justifying this bypassing by Congress. *Id.* He concluded that this sanctuary designation would "augment" the federal government's efforts to protect the marine resources of the Florida Keys. *Id.*

B. The Fishers argue that 18 U.S.C. § 1434(a)(1) precludes the bringing of an enforcement action in the district court until the Secretary has promulgated a management plan for the sanctuary that includes enforcement activity. That section provides that "[i]n proposing to designate a national marine sanctuary, the Secretary," on the same day that the notice of the proposal is published in the Federal Register, shall submit to two specified House and Senate committees "a prospectus on the proposal which shall contain," among other things, the "draft management plan detailing . . . enforcement, including surveillance activities for the area." Relying on the statement in the Florida Keys Act that the Florida Keys Sanctuary "shall be managed and regulations enforced under all applicable provisions" of the Sanctuaries Act "as if the Sanctuary had been designated under" that Act (Florida Keys Act, § 5(a)), the Fishers contend that the Secretary is required to submit a prospectus to Congress specifying his proposed enforcement actions for the Florida Keys Sanctuary before the government may maintain district court enforcement action.

The reference in § 1434(a)(1) to "enforcement, including surveillance activity in the area" refers to a marine sanctuary that the Secretary has proposed to designate, not to one that Congress itself has designated. The words "in the area" refer back to the previous section, which deals with designation of sanctuaries by the Secretary. Moreover, the "enforcement . . . activities" appear to be those administrative actions that the Secretary himself plans to conduct in the sanctuary he proposes to designate, pursuant to his authority under 16 U.S.C. § 1437(a), which states that "[t]he Secretary shall conduct such enforcement activities as are necessary and reasonable to carry out this chapter."

Nothing in these provisions requires that, before the government may file an enforcement action in the district court the Secretary must submit to Congress a prospectus specifying his enforcement plan. To the contrary, 16 U.S.C. § 1437(i) provides that, if the Secretary determines that there "is an imminent risk of destruction or loss of or injury to a sanctuary resource, or that there has been actual destruction or loss of, or injury to, a sanctuary resource which may give rise to liability under section 1443 of this title," the Attorney General, on request of the Secretary, shall seek in a district court relief "necessary to abate such risk or actual destruction, loss, or injury, or to restore or replace the sanctuary resource, or both."

The only requirements for the bringing of such an action thus are (1) the Secretary's determination of an imminent risk of destruction or loss of, or injury to, a sanctuary resource and (2) a request by the Secretary to the Attorney General to bring an enforcement action. Nothing in this section, pursuant to which the United

States filed the present suit, even suggests, let alone requires, that prior thereto the Secretary must have informed Congress about his enforcement plans for the sanctuary.

C. The Fishers contend that before the United States may file an enforcement suit, the Secretary must have filed an environmental impact statement. They rely on 16 U.S.C. § 1434(a)(2), which requires the Secretary, in connection with a proposed designation of "a national marine sanctuary," to "prepare a draft environmental impact statement, as provided by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), on the proposal that includes . . . maps depicting the boundaries of the proposed designated area. . . . "

This provision, however, like other previously discussed provisions of the Sanctuaries Act upon which the Fishers rely, relates to a sanctuary designated by the Secretary, not to one designated by Congress. There is no requirement in the statute that before the Congressional establishment of a sanctuary becomes effective, the Secretary must first prepare an environmental impact statement for that sanctuary. If Congress had intended to impose that requirement for sanctuaries that it designated, presumably it would have said so explicitly – as it did with respect to sanctuaries that the Secretary designates.

The Fishers rely on the statement in the House Report on the Florida Keys Act that "the Committee expects that the Secretary will . . . prepare an environmental impact statement" for the Florida Keys Sanctuary. (H.R.Rep. No. 593, 101st Cong. 2d Sess., pt. 1 at 9 (1990)).

That comment, however, merely stated the Committee's expectation that the Secretary would prepare a statement. It did not provide that, until that statement had been prepared, the Congressional designation of the sanctuary would not be effective.

In holding that the government is substantially likely to prevail on the merits of its claim that the Fishers violated 16 U.S.C. § 1443, the magistrate judge noted that under that section, which makes liable to the United States "any person who destroys, causes the loss of, or injures any sanctuary resource," the government "must show simply that the defendants have injured sanctuary resources." He pointed out that in light of the stipulation, it was "undisputed" that the Fishers used prop wash deflectors in the Florida Keys Sanctuary and that such use created at least 100 openings in the seabed there. The magistrate judge stated that expert testimony indicated that "these depressions have injured and disrupted vital seagrass elements" there and he held that "the injured seagrass environments are clearly 'sanctuary resources' under the [Sanctuaries Act] 16 U.S.C. § 1432(8)." These facts and conclusions, which the Fishers do not here challenge, support the magistrate judge's conclusion that the government is substantially likely to prevail on the merits.

The district court also properly rejected the Fishers' purported defenses to the charges against them. Section 1434(c) in essence permits conduct in a sanctuary that was authorized by a permit in existence prior to the designation of the sanctuary. The Fishers stipulated, however, that they did not have a permit covering their use of prop wash deflectors in the Florida Keys Sanctuary.

Although the Fishers assert that it would have been futile for them to have sought such a permit because the Administration had not adopted procedures for the issuance of permits and, in fact, was not issuing permits, the Fishers never applied for such a permit. We decline to speculate whether, if they had so applied, the Administration would have denied their application and, if it had done so, whether, on judicial review, the Fishers could have reversed that denial.

We discern no basis for the Fishers' contention that their history of prior salvage operations constitutes a defense to the violation of the Sanctuaries Act with which they are charged.

E. Considering all the circumstances, the district court justifiably concluded that the government had shown a substantial likelihood of success on the merits and did not abuse its discretion in granting the limited preliminary injunction, prohibiting only the use of prop wash deflectors. That injunction is AFFIRMED.

APPENDIX "C"

Magistrate's Report and Recommendation for Preliminary Injunction, June 10, 1992, *United States v. Fisher, et al.* (S.D. Fla. No. 91-10027-CIV-DAVIS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10027-CIV-DAVIS

MAGISTRATE JUDGE GARBER

UNITED STATES OF AMERICA,

Plaintiff,

v.

MELVIN A. FISHER, et al.,

Defendants.

_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the undersigned pursuant to an April 29, 1992 Order of Reference entered by the Honorable James Lawrence King, United States District Judge. In accordance with the order of Reference, the undersigned respectfully submits his Report and Recommendation on plaintiff United States of America's (the "government's") Motion for a Preliminary In I junction. The Report and Recommendation is based upon hearings held before the undersigned on May 13 and May 14, 1992, review of the memoranda and exhibits submitted by the parties, and upon careful examination of relevant case law. For the following reasons, the undersigned RECOMMENDS that the government's motion be GRANTED.

I. BACKGROUND

On April 21, 1992, the government filed this action against defendant Melvin A. Fisher, his son Kane Fisher, their salvage company Salvors, Inc., and three of their

salvage vessels. The complaint seeks damages and injunctive relief pursuant to chapter 32 of the Marine Protection, Research, and Sanctuaries Act ("MPRSA"), 16 U.S.C. §§ 1431-1445.

On April 22, 1992, the government moved for a preliminary order enjoining defendants from "further dredging or salvage activities within the Florida Keys National Marine Sanctuary until trial or other disposition of the merits of this action." (Gov. Motion, at 1.) The defendants have cross-moved for a preliminary injunction to prevent the government from interfering with their salvage activities.

II. DISCUSSION

To obtain a preliminary injunction against the defendants, the government must prove: (1) that they have a substantial likelihood of success on the underlying merits of their action; (2) that they will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiffs outweighs the harm the proposed injunction would cause the defendants; and (4) that the injunction would not be adverse to the public interest. *All Care Nursing Serv. v. Bethesda Memorial Hosp.*, 887 F.2d 1535, 1537 (11th Cir. 1989). The undersigned considers the four requisites *seriatim* below.

A. Success on the Merits

1. The MPRSA and the Sanctuary Act

The plaintiffs claim that the defendants violated chapter 32 of the MPRSA. This chapter

> provides for the protection of important and sensitive marine areas and resources of national significance through the establishment of marine sanctuaries. The purpose of these sanctuaries is to preserve or restore such areas for their conservation, recreational, ecological, or aesthetic value.

S. Rep. No. 595, 100th Cong., 2d Sess. 1, *reprinted* in 1988 U.S. Code Cong. & Admin. News 4387.

The MPRSA authorizes the Secretary of Commerce to designate and manage national marine sanctuaries. 16 U.S.C. §§ 1433, 1434. The Secretary also acts as trustee for sanctuary resources. *Id.* § 1443(c). The National Oceanic and Atmospheric Administration ("NOAA") performs the duties of the Secretary under the MPRSA.

Besides the Secretary, Congress itself may designate an area as a marine sanctuary for purposes of the MPRSA. Congress exercised this power in 1990 by creating the Florida Keys National Marine Sanctuary (the "Sanctuary"). The Sanctuary was established by the Florida Keys National Marine Sanctuary and Protection Act (the "Sanctuary Act"), Pub. L. No. 101-605, 104 Stat. 3089 (1990). The Sanctuary Act provides that "[t]he Sanctuary shall be managed and regulations enforced under all applicable provisions of [the MPRSA] as if the Sanctuary had been designated" thereunder. sanctuary Act, § 5(a).

The Sanctuary Act expressly prohibits certain uses in the Sanctuary, such as mineral and hydrocarbon production. *Id.* § 6. It also requires the Secretary of Commerce to consult with various authorities to "develop a comprehensive management plan and implementing regulations to achieve the policy and purpose of this Act." *Id.* § 7. The

Sanctuary Act then sets out in detail the features of this management plan, the importance of public participation in its drafting, and the requirement that such a plan be completed within 30 months after the Sanctuary Act's passage. *Id.*

2. Section 1443

The government contends that the defendants have violated § 1443 of the MPRSA[1] Section 1443 provides that

> [s]ubject to (certain affirmative defenses], any person who destroys, causes the loss of, or injures any sanctuary resource[2] is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.

16 U.S.C. § 1443(a)(1).

To prevail on its § 1443 claim, the government must show simply that the defendants have injured sanctuary resources. After careful consideration the undersigned finds that the government is substantially likely to prevail on this claim.

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[1] Possible liability under § 1443 enables the Secretary of Commerce to seek injunctive relief "as may be necessary to abate such risk or actual destruction, loss, injury, or to restore or replace the sanctuary resource, or both." 16 U.S.C. § 1437(i).

[2] "Sanctuary resources" are defined as "any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

First, it is undisputed that the defendants have used prop wash deflectors[3] in the Sanctuary. (Stipulations, ¶ 11.) It is also undisputed that the defendants' use of prop wash deflectors created at least 100 depressions in the Sanctuary area. (*Id.* ¶ 16.)

Second, persuasive testimony by Dr. Joseph Zieman indicates that these depressions have injured and disrupted vital seagrass environments in the Sanctuary.[4] (Transcript, at 84-92.) This seagrass, anchored on the ocean's bottom, is an integral part of the coral reef ecosystem and serves as shelter, food, and habitat for myriad life forms present in the Sanctuary. Dr. Zieman testified that "regrowth of that grass is probably not going to occur within our life times." (*Id.* at 90.)

Finally, the injured seagrass environments are clearly "sanctuary resources" under the MPRSA.[5] 16 U.S.C.

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[3] Prop wash deflectors, or "mailboxes," are used to direct propeller wash to remove seabed sediments and expose underlying materials. (Stipulations, ¶ 10.)

[4] However, the government did not present evidence of damage to living coral reef systems that would support their burden on a motion for preliminary injunction.

[5] The government also alleges that the defendants have damaged or scattered historical artifacts and thereby ruined archaeological sites for "legitimate" or "accepted" archaeologists. (Motion, at 12.)

The derisive tone of such statements is regrettable. The undersigned does not agree that seeking profits as well as history renders the search for lost artifacts any less "legitimate." As this Court has noted, defendant Melvin A. Fisher "employs the most modern and sophisticated methods of underwater exploration and shallow water excavation of ancient shipwrecks available. . . . Equally impressive are the efforts [Fisher]

§ 1432(8). The Sanctuary Act expressly refers to the protection of "seagrass meadows." Sanctuary Act, §§ 2(2), 2(3). There is little dispute that seagrass beds contribute to conservation, recreational, ecological, research, educational, and aesthetic values, as intended by the Sanctuary Act. *Id.*

Accordingly, the undersigned finds that the government is substantially likely to prevail on its § 1443 claim against the defendants.

3. Designation vs. Implementation

The defendants do not truly dispute the factual underpinnings of the above analysis.[6] Instead, the

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employs to record the valuable historical and archaeological information concerning the exact location, depth and proximity of each item found with respect to other items." *Cobb Coin Co. v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 549 F. Supp. 540, 558 (S.D. Fla. 1982). Although the undersigned does not approve of any attempt to denigrate the defendants' work, the undersigned need not decide the government's historical resources claim because the damaged seagrass, clearly constitutes "sanctuary resources" under the MPRSA.

[6] As a factual matter, the defendants do dispute whether the damage caused by their activities, if any, is sufficient to support a § 1443 claim. In fact, the defendants assert that disrupting the seagrass communities has a *beneficial* effect on the environment by exposing rubble and increasing the biological diversity of life supportable in that area. (*E.g.*, Transcript, at 96-99.) The defendants may well be able to establish that claim at trial. However, the evidence presented to the undersigned did not support the defendants' contention and instead overwhelmingly supported the conclusion that

defendants strongly dispute whether the Sanctuary Act has "taken effect" under the MPRSA. Because the Sanctuary Act has not yet "taken effect," the defendants argue that it cannot prohibit their conduct.[7]

The Sanctuary Act requires a comprehensive management plan be completed within 30 months of its passage. Sanctuary Act, § 7. Section 1434 of the MPRSA also provides for similar procedures and implementation of a management plan after designation by the Secretary of Commerce. 16 U.S.C. § 1434(b)(1). Because the procedures involving consultation and public input allegedly have not been followed, and because a comprehensive management plan has not been completed, the defendants reason that the Sanctuary Act has not been implemented.

This argument is creative and has some merit, but it is not supported by § 1443 of the MPRSA. Section 1443 does not condition the prohibition of injury to sanctuary resources upon the implementation of a management plan. 16 U.S.C. § 1443(a)(1). Rather, § 1443 simply bars the destruction or injury of any sanctuary resource. A "sanctuary resource" is any living or nonliving resource with

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widespread disruption of seagrass "damages" the Sanctuary, as that term is used in § 1443. (*Id.* at 93-95.)

[7] The defendants also argue that the Sanctuary Act displaces or intrudes upon the Court's admiralty jurisdiction over *in rem* claims based on the law of finds and the law of salvage. This argument confuses federal maritime jurisdiction with Congress' power to add new maritime liabilities. Congress has long had such power and properly exercised it here. *See Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) (noting Congress' power to "alter, qualify, or supplement the substantive admiralty law").

ecological or other value that is contained in a "national marine sanctuary." *Id.* § 1432(8). The seagrass beds injured by the defendants are contained in a "national marine sanctuary." Sanctuary Act, § 5(a).

In other words, to prevail on their statutory argument, the defendants must convince the Court that the Florida Keys National marine sanctuary is not yet a "national marine sanctuary" under § 1432(8) because the Secretary has not yet developed a management plan. This will be difficult, as there is no statutory basis for such a threshold condition. Although the Sanctuary Act and the MPRSA both contemplate the development of such a plan, there simply is no requirement that one be developed before treating the Sanctuary as a "national marine sanctuary." If the Sanctuary is indeed a "national marine sanctuary," then the defendants may not destroy or injure sanctuary resources within its boundaries. Because the Sanctuary Act expressly defines the Sanctuary as a "national marine sanctuary" under the MPRSA, the defendants' argument must fail.[8] *Cf. United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 662 (1973) (rejecting defendant's argument that government could not enforce environmental liability provisions until the permit program Congress authorized in those provisions actually was implemented).

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[8] The fact that Congress rather than the Secretary designated the Florida Keys National Marine Sanctuary is irrelevant: section 1443 prohibits the destruction of sanctuary resources *irrespective* of the Secretary's obligation under the MPRSA to develop a management plan for the designated area.

4. Affirmative Defenses Under the MPRSA

The defendants also contend that their long history of doing battle with governmental authorities over hunting for treasure at the sea bottom constitutes some sort of defense under the MPRSA. The undersigned does not agree.

The MPRSA provides narrow and specific exceptions to the general prohibition of § 1443(a)(1). *See* 16 U.S.C. § 1443(a)(3)(B) (injury caused by an activity "authorized by Federal or State law"); § 1434(c) (valid permit in existence before designation of sanctuary). These exceptions all pertain to a specific grant to damage sanctuary resources. Defendants have no such grant in the Coffins Patch area of the Sanctuary now at issue. The defendants stipulated that they have no salvage or recovery permit from the NOAA in any area of the Sanctuary. In sum, the defendants do not have a permit or pre-existing license to cause damage to sanctuary resources under the MPRSA.

B. Irreparable Injury

In the Eleventh Circuit, irreparable injury is ordinarily presumed where the defendant violated a statute designed to protect public rights. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d. 1417, 1423 (11th Cir. 1984). Injury is irreparable if it "cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987).

Here, the defendants have stipulated that absent a court order they will continue ongoing salvage activities in the Sanctuary. These activities have already caused

damage to seagrass communities in that region. According to Dr. Zieman, it will take decades to repair this damage at an incalculable cost. As Dr. Zieman put it, "H. Ross Perot does not have enough money to restore that in our lifetimes." (Transcript, at 94.)

On the basis of this evidence, the undersigned concludes that the government will be irreparably harmed if an injunction is not issued pending resolution of this action on the merits.

C. Injury Versus Harm

The injunction sought by the government, barring the defendants from all salvage activities in the Sanctuary, is overbroad and unsupported by the evidence. The government has only shown damage to the Sanctuary from the defendants' use of prop wash deflectors. The government presented no evidence that other salvage techniques employed by the defendants cause damage to sanctuary resources.

Accordingly, the undersigned finds that an injunction barring the defendants from employing prop wash deflectors would be sufficient to ensure that the Sanctuary is not further damaged. This injunction should not bar the defendants from pursuing their livelihood by using other salvage techniques in the Sanctuary area.

D. Public Interest

A preliminary injunction barring the defendants from employing prop wash deflectors in the Sanctuary would serve the public interest. This interest is reflected in the

enactment of the MPRSA and the Sanctuary Act. Such an injunction would remain in effect and serve the public interest until the Court definitively resolves the merits of this dispute.

However, the interests of the public may not be served by permanently depriving the defendants and like-minded individuals of their livelihood. The undersigned is not convinced that such a result is intended or compelled by the Sanctuary Act. Accordingly, the comprehensive management plan which must ultimately be promulgated for the Sanctuary should take the interests of the defendants into account. To the extent retrieval of artifacts from the Sanctuary is a valid and worthwhile goal, some accommodation with the defendants may be wise in exchange for their efforts at preserving our human history.

III. CONCLUSION AND RECOMMENDATION

Although § 1443 of the MPRSA was enacted in 1988, the underlying statutory scheme (chapter 32 of the MPRSA) was enacted in 1972. Yet there is not a single reported case interpreting its terms. This lack of precedent forced the government to base its position entirely on cases interpreting other statutes and environmental laws.

Even so, the government has proven that it is substantially likely to prevail in its § 1443 action against the defendants. Accordingly and after a careful review of this matter, the undersigned respectfully

RECOMMENDS that the government's Motion for a Preliminary Injunction be GRANTED. The Court should issue a preliminary injunction barring the defendants from employing prop wash deflectors in the Sanctuary. The defendants' cross-motion for a preliminary injunction should be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation within which to file written objections, if any, with the Honorable Edward B. Davis, United States District Judge. See 28 U.S.C. § 636. Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.), *cert. denied*, 488 U.S. 958 (1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 10th day of June, 1992.

/s/ Barry L. Garber
BARRY L. GARBER
UNITED STATES
MAGISTRATE JUDGE

Copies furnished to:
Hon. Edward B. Davis, U.S. District Judge
Counsel of Record

APPENDIX "D"

Order Granting Preliminary Injunction, July 23, 1992, *United States v. Fisher, et al.* (S.D. Fla. No. 91-10027-CIV-DAVIS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-10027-CIV-DAVIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

MELVIN A. FISHER, et al.,

Defendant.

_____/

ORDER

(Filed Jul. 23, 1992)

This cause is before the court on the parties' cross-motions for preliminary injunction and the Defendants' proffer of new evidence. These matters were referred to Magistrate Judge Garber for consideration. Based upon the Magistrate's recommendation, and after independent review of the record, it is

ORDERED AND ADJUDGED that the Plaintiff's motion for preliminary injunction be GRANTED and the Defendants' motion for preliminary injunction be DENIED. It is further

ORDERED AND ADJUDGED that the Defendants' proffer of new evidence is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this ____ day of July, 1992.

/s/ Shelley Highsmith
FOR EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Counsel of record
The Honorable Barry Garber

APPENDIX "E"

Order on Summary judgment, April 30, 1997, *United States v Fisher, et al.* (S.D. Fla. Nos. 91-10027-CIV-DAVIS) and *Motivations, Inc. v. Unidentified Wreck,* (S.D. Fla. No. 95-10051-CIV-DAVIS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MELVIN A. FISHER, et al.,

Defendants.

_____/

MOTIVATION, INC.,

Plaintiff,

v.

UNIDENTIFIED, WRECKED AND ABANDONED SAILING VESSEL, etc.,

Defendant.

_____/

CASE NO. 92-10027-CIV-DAVIS
CASE NO. 95-10051-CIV-DAVIS

ORDER ON SUMMARY JUDGMENT

(Filed April 30, 1997)

THIS MATTER is before the Court on the United States of America's Motion for Summary Judgment (D.E. # 146). The Defendants in Case Number 92-10027 responded (D.E. # 159). The Court held a hearing on April 14, 1997. These consolidated cases raise the issues of whether Mel Fisher and his businesses legally salvaged in the Florida Keys National Marine Sanctuary, or illegally operated there and damaged Sanctuary resources. The Government's summary judgment motion seeks

damages of more than $600,000, and an injunction preventing the companies from harming Sanctuary resources and ordering the return of artifacts.

The Court has thoroughly reviewed the extensive record, including dozens of deposition transcripts and expert reports, and considered the oral arguments of counsel. For the reasons outlined below, the Court grants the Government's motion only on the issue of whether the Defendants in Case Number 92-10027 had any pre-existing salvage rights in the Sanctuary. Otherwise, the Court denies the Government's motion.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Statutory Scheme

Congress enacted the Marine Protection, Research and Sanctuaries Act ("Sanctuaries Act"), codified at 16 U.S.C. §§ 1431-45, in response to a "growing concern about the increasing degradation of marine habitats." S. Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4387. The statute allows the Secretary of Commerce to designate and manage marine sanctuaries to protect marine resources. 16 U.S.C. §§ 1431, 1433.

The statute authorizes the Secretary to enforce the Sanctuaries Act by seeking damages from and injunctions against any person who destroys or injures sanctuary resources. 16 U.S.C. §§ 1437, 1443. Under Section 1443, any person who harms a sanctuary resource is strictly liable to the government, unless he can show that the damage (1) was caused by an act of God, an act of war, or the act or omission of a third party; (2) was caused by an

activity authorized by federal or state law; or (3) was negligible. 16 U.S.C. § 1443(a)(1) and (3). The law defines a statutory resource as "any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

Congress also may designate sanctuaries, as it did in 1990 when it passed the Florida Keys National Marine Sanctuary Act ("Florida Keys Act"), Pub. L. No. 101-605, 104 Stat. 3089 (1990). That Act provides that the Secretary shall manage the Florida Keys National Marine Sanctuary ("Florida Keys Sanctuary") under the aforementioned statutory scheme. Florida Keys Act, § 5(a). The Secretary of Commerce has delegated management and enforcement duties under both acts to the National Oceanic and Atmospheric Administration ("NOAA").

Among the Congressional findings in the Florida Keys Act were that "spectacular, unique, and nationally significant marine environments, including seagrass meadows," needed protection. Florida Keys Act, § 2.2. Seagrass is distributed in significant amounts along the Florida coast. Kruer Depo. at 45. It helps produce organic matter that forms an important base of the food chain. *Id.* Manatees and fish graze on it. *Id.* at 47. It provides a habitat and refuge for numerous small invertebrates and fish. *Id.* It also minimizes current effect in some areas, thereby reducing erosion. *Id.* at 48. Seagrass is a resource within the meaning of both the Florida Keys and the Sanctuaries Acts. *United States v. Fisher*, 22 F.3d 262, 265 (11th Cir. 1994).

B. The Facts

This case has a lengthy factual and procedural history. In Case Number 92-10027, the Defendants are Mel and Kane Fisher, Salvors, Inc., and three boats. Mel Fisher is president of Salvors, Inc., a marine salvage company. M. Fisher Depo. of Jan. 9, 1997, at 48. Kane Fisher, Mel Fisher's son, is operations manager of Salvors, Inc. K. Fisher Depo. of May 2, 1995, at 4. He is also captain of the Dauntless, one of the three Defendant boats. *Id.* at 8. The three boats were either owned by or working under subcontract for Salvors, Inc., during January, February and March of 1992. *Id.* at 22; Def. Answer in Case Number 92-10027 ("Answer") at ¶ 25. The Plaintiff in Case Number 95-10051, Motivation, Inc., is another marine salvage company that the Fishers operate. M. Fisher Depo. of Jan. 9, 1997, at 49. Mel Fisher is president. *Id.* The Court will use the term Defendants to refer collectively to the Fishers, Salvors, Inc., and the three boats.

The Fishers are well-known treasure hunters and maritime salvors who have achieved fame and fortune salvaging sunken 17th- and 18th-century Spanish sailing ships off the coast of Florida. Govt. Corrected Memo. of Law Supporting Summary Judgement Motion ("Govt. Memo") at 3. *See also, e.g., MDM Salvage, Inc., v. Unidentified Wrecked and Abandoned Sailing Vessel,* 631 F. Supp. 308 (S.D. Fla. 1986); *Treasure Salvors, Inc., v. Unidentified Wrecked and Abandoned Sailing Vessel,* 408 F. Supp. 907 (S.D. Fla. 1976), *aff'd* 569 F.2d 330 (5th Cir. 1978).

The instant case involves the Fishers' activities in an area known as Coffins Patch, located a few miles off the coast of Marathon, Florida, in the Florida Keys Sanctuary.

Ex. A and C to Govt. Memo. The Defendants argue that the case really began in 1986 in an unrelated lawsuit. In *MDM Salvage*, 631 F. Supp. 308, two competing companies sought exclusive salvage rights in Coffins Patch. This was four years before Congress passed the Florida Keys Act, so there were no legal bars to salvaging in the area. *Id.* at 314. The *MDM Salvage* court at first temporarily enjoined all parties from salvaging in Coffins Patch. *Id.* at 310. After determining that no one had established a right to exclusive operations there, the Court lifted the injunction and allowed the parties to resume normal salvage operations. *Id.* at 314.

From January through March of 1992, the three Defendant boats searched for treasure in Coffins Patch. Ex. C to Govt. Memo; K. Fisher Depo. of May 2, 1995, at 22; Answer at ¶ 25; Def. Answer to Plaintiff's First Set of Interrogatories at 2(c). Mel Fisher only went to Coffins Patch once during this period. M. Fisher Depo. of Jan. 8, 1997, at 57-58. Fisher also had little to do with deciding to salvage in Coffins Patch, as he is a "figurehead" president who signs checks and autographs and poses for pictures with tourists. *Id.* at 57-63; M. Fisher Depo. of Jan. 9, 1997, at 48. The Fishers believed they had a right to salvage in Coffins Patch due to the court order lifting the injunction in *MDM Salvage*. M. Fisher Depo. of Jan. 8, 1997, at 8. Mel Fisher claims that two different federal government officials verbally gave him permission to salvage in the area. M. Fisher Depo. of Jan. 9, 1997, at 16, 22.

Kane Fisher participated more directly in the 1992 salvage operations. K. Fisher Depo. of May 2, 1995, at 29-30, 50, 69, 77, 81. As captain of the Dauntless, he directed the expedition. *Id* at 28. Kane Fisher and other

crew members searched for buried treasure in Coffins Patch primarily by using "prop wash deflectors" or "mailboxes." *Id.* at 29-49. These are devices used to direct the boat's propeller wash downward into the water instead of away from the boat. M. Fisher Depo. of Jan. 8, 1997, at 66. The resulting stream slowly forces a large column of clear water down to the bottom of the ocean and displaces sediment so that salvagers can unearth buried items. *Id.*

This "mailboxing" method created depressions known as blowholes along the sandy ocean bottom. K.. Fisher Depo. of May 2, 1995, at 29-49. When Kane Fisher began salvaging in Coffins Patch, he noticed a number of blowholes already there, probably from previous salvagers. *Id.* at 29, 77-79; K. Fisher Depo. of Jan. 8, 1997, at 49-51. Several people told Fisher that they had salvaged in the area and used mailboxes in 1990 and 1991. K. Fisher Depo. of May 2, 1995, at 77-79. However, no one else was working in the area at the same time as the Fishers. *Id.* at 76. Kane Fisher testified that he used mailboxes only where there was sand or rubble at the ocean bottom, not seagrass. *Id.* at 72-73. He believes he may have displaced a very slight amount of seagrass, but that any damage was minimal. *Id.* at 76.

The Fishers stopped salvaging in Coffins Patch in mid-March of 1992 due to mechanical problems. *Id.* at 71. Before stopping, they made between 100 and 600 blowholes, and found about 200 artifacts in 210 of the holes. Ex. 4 to Murphy Depo. at 4-9; Ex. A to Govt. Memo. The artifacts they recovered included an iron cannon, an iron anchor, silver forks and plates, pilar dollars, silver coins, ships' rigging, ballast, cannon and musket balls, spikes,

silver patties, and bronze religious medallions. Ex. A to Govt. Memo. Both sides agree that these artifacts have historical significance, as they likely came from two Spanish vessels known to have sunk in the area in the mid-1700s. *Id.*

Beyond having historical significance in and of themselves, the artifacts have archeological significance because of their location and condition. Ex. 4 to Murphy Depo.; Murphy Depo. To maximize artifacts' archeological value, experts suggest that treasure hunters should have a specific plan that includes conducting initial research of a salvage site, generating a comprehensive research design, conducting a systematic remote sensing survey, mapping the accurate location of the artifacts, recording the stratigraphic and environmental data, doing test excavations, then conserving the artifacts once they are recovered. Ex. 4 to Murphy Depo. at 2-7; Ex. R to Govt. Memo. The Fishers had a specific plan for recovering artifacts in Coffins Patch that encompassed some, but not all, of these elements. Mathewson Depo. at 105-08. This plan, however, was not written; it was in Kane Fisher's head. K. Fisher Depo. of Jan. 8, 1997, at 32.

Following the Defendants' departure from Coffins Patch, scientists found displaced and damaged seagrass. Ex. F, L, and N to Govt. Memo. Scientists dispute the amount of damage, as well as who caused it and how. *Id.*; Depos. of Zieman, Kruer, Fonseca, Wanless and Thorhaug. Using aerial photography, maps and estimates, a marine consulting firm hired by the Fishers in the spring of 1992 estimated that the Defendants had made 597 blowholes that damaged 1.63 acres of seagrass. Ex. F to

Def. Motion. For purposes of the 1992 preliminary injunction hearing in this case, the Fishers stipulated that their salvaging had damaged 1.63 acres of seagrass.[1]

Another expert, who visited the sites and reviewed aerial and underwater photography in 1992, found "severe and extensive" damage to Coffins Patch seagrass beds. Ex. L to Govt. Memo at 3. Joseph Zieman found a number of large holes several meters deep, ranging in diameter from six to seventeen meters. *Id.* at 4. Seagrass beds had been ripped out. *Id.* The holes were markedly different from naturally-caused depressions, and the only similar damage that Zieman had ever seen came from 1,000- to 2,000-pound bombs inadvertently dropped from naval aircraft onto seagrass beds. *Id.* at 3-4. Zieman estimated the damage at close to two acres. He also estimated that "when I was on the sites in '92, it was clear to me the that holes I was seeing there were done days to weeks to a month or so before I was there . . . incredibly fresh." Zieman Depo. of February 28, 1997, at 150.

A third expert who examined the damage found holes up to nine feet deep and thirty-six to forty-six feet in length and width. Ex. N to Govt. Memo. Curtis Kruer also found the damage "severe and extensive," and indicated that "no natural disturbances" could create the type

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[1] The Government argues that it is entitled to summary judgment on the issue of liability because of this stipulation, and the fact that the Sanctuaries Act imposes strict liability on anyone who damages seagrass. 16 U.S.C. § 1443(a)(1). Since the stipulation was for purposes of the preliminary injunction hearing only, the Court is unwilling to grant summary judgment on those grounds. However, the Court cannot ignore the fact that the Fishers entered into this stipulation.

of irregular, deep holes he found in Coffins Patch. *Id.* Kruer estimated that the damage had been done in the two months prior to his April 1992 inspection. *Id.;* Kruer Depo. at 122-24. Kruer visited the area again in August 1996 and found "not much regrowth." Kruer Depo. at 122-24.

Government scientists estimate that it would take 50 to 100 years for the damaged seagrass beds to completely recover. Ex. L to Govt. Memo at 8. However, scientists say they cannot replant seagrass in the damaged areas because Coffins Patch is swept with high energy waves that keep bare sand areas in motion. This, in turn, inhibits recolonization of seagrass. Ex. J and K to Govt. Memo; Ex. L to Govt. Memo at 9. By 1996, none of the Government's attempts to plant seagrass in Coffins Patch had succeeded. Ex. J to Govt. Memo.

The Government commissioned expert studies to identify potential seagrass restoration projects in the Florida Keys Sanctuary similar in scale to the damaged areas in Coffins Patch. Ex. J, N, and O to Govt. Memo. Using what is known as a Habitat Equivalency Analysis, Government scientists determined it would cost $351,648 to compensate for the Coffins Patch damage by restoring 1.55 acres of seagrass in another damaged area. *Id.* In addition, Government scientists estimated that it cost $211,130 to respond to and assess the damage the Defendants caused. Ex. P to Govt. Memo.

Scientists whom the Defendants hired also visited Coffins Patch and viewed pictures of it. They dispute the amount and type of seagrass damage. Depos. of Wanless, Thorhaug. Harold Wanless visited the site in 1996, and

reviewed pictures of it taken in the 1970s and 1990s. He concluded that none of the holes in Coffins Patch previously had seagrass in them. Wanless Depo. at 68-70. Wanless also said it was difficult to tell whether the holes were man-made or natural. *Id.* at 86-93. He estimated that recovery from the damage described by Government scientists would take only fifteen to twenty-five years. *Id.* at 161-62.

Anita Thorhaug, who visited the site in 1994, found no holes of the type Government scientists described. Thorhaug Depo. of May 25, 1995, at 148-55. She reported seeing only natural depressions and escarpments in the sand. Thorhaug Depo. of February 14, 1997, at 69-76. In fact, she saw no abnormal conditions anywhere in the area the Government claims was damaged. *Id.* at 85-91. The only evidence of any seagrass damage she saw was "some blades here and some blades there and some blades over there . . . " *Id.* at 91. She also agreed with Wanless that recovery of the type the government described would take only fifteen to twenty-five years.[2]

C. *Procedural History*

The United States filed its complaint in Case Number 92-10027 on April 21, 1992, seeking damages and an injunction. The Government moved for a preliminary injunction, and the Defendants cross-moved for an injunction to restrain the Government from interfering

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[2] This section only summarizes the myriad opinions in this case. To fully recount the thousands of pages of reports and deposition testimony of the experts would take much longer.

with their salvage activities. This Court referred the motions to Magistrate Judge Garber, who after hearing extensive testimony recommended that the Court issue a preliminary injunction restraining the Defendants from using prop wash deflectors in Coffins Patch in violation of the Sanctuaries and Florida Keys Acts. Magistrate Judge Garber also recommended that the Court deny the Defendants' request for an injunction. The Court adopted the Magistrate's recommendations and issued a preliminary injunction. The Eleventh Circuit affirmed. *United States v. Fisher*, 22 F.3d 262 (11th Cir. 1994).

In 1995, Motivation, Inc., filed its *in rem* action against an unidentified, wrecked, and abandoned vessel, seeking title and a salvage award for the artifacts that the Fishers had recovered in Coffins Patch. *See* Case Number 95-10051.[3] On June 18, 1996, the Court allowed the United States to intervene in the second case. The Court has consolidated both cases for discovery and trial.

DISCUSSION

I. THE STANDARD OF REVIEW

A moving party is entitled to summary judgment only where no genuine issue of material facts exists and the party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). On a motion for summary judgment, a court must view all the evidence in a light most favorable to the non-moving

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[3] The Fishers have stipulated that the artifacts they seek in the later action are the same ones the Government seeks in the earlier-filed case.

party. *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991). The moving party bears the burden of establishing that there is no genuine issue of material fact. *Mize v. Jefferson City Bd of Educ.*, 93 F.3d 739, 742-43 (11th Cir. 1996). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron and Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988).

II. THE DEFENDANTS HAD NO PREEXISTING SALVAGE RIGHTS

The Defendants contend that as a matter of law Judge Aronovitz granted them an ongoing right to salvage in the Florida Keys Sanctuary when he lifted the injunction in *MDM Salvage*, 631 F. Supp. 308. As an extension of that argument, the Defendants argue that the Florida Keys Act did not supplant maritime salvage law, which allows them to salvage in the Florida Keys Sanctuary and take title to artifacts they discover there.[4] Both arguments are

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[4] The Court notes that there may be a question of whether maritime salvage law or the common law of finds governs the Fishers' claim to salvage rights and title in the artifacts. *See, e.g., MDM Salvage*, 631 F. Supp. at 312. The Court need not address that question, as the Florida Keys Act bars application of either theory in this case.

pertinent because the Sanctuaries Act provides that a party shall not be liable for damaging sanctuary resources if federal law authorized the activity causing the damage. 16 U.S.C. § 1443(a)(3)(B). The Defendants' reliance on Judge Aronovitz' decision and maritime salvage law to establish this affirmative defense is misplaced. Neither maritime salvage law or the *MDM Salvage* decision constitute a "federal law" authorizing the Defendants to salvage in the Florida Keys Sanctuary.

All Judge Aronovitz did in *MDM Salvage* was lift an injunction preventing salvaging in Coffins Patch and allow a return to the status quo. The status quo in 1986 was freedom to salvage outside state territorial waters: "the Court cannot and should not fashion injunctive relief which would unnecessarily unduly infringe on freedom of navigation and travel on the high seas. . . . " *MDM Salvage,* 631 F. Supp at 312-13. The Defendants ask the Court to interpret this order as giving them a perpetual right to salvage in Coffins Patch. But to read a court order narrowly fashioned to fit the circumstances of one case as the equivalent of a law passed by Congress or regulations adopted by a federal agency vastly overstates the order's reach. The Eleventh Circuit so found in affirming the preliminary injunction in this case: "We discern no basis for the Fishers' contention that their history of prior salvage operations constitutes a defense to the violation of the Sanctuaries Act with which they are charged." *Fisher,* 22 F.3d at 270. In keeping with that ruling, the Court finds as a matter of law that Judge Aronovitz's 1986 order was not a federal law within the meaning of the Sanctuaries Act that would enable the Defendants to

plead the affirmative defense that federal law authorized their activity in Coffins Patch.

The same holds true with respect to the Defendants' claim that maritime salvage law authorized their activity. Congress has the right to modify general admiralty law. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 962 (M.D. Fla. 1993). The *Lathrop* court rejected the argument that the Defendants make here. In that case, the plaintiff was salvaging in the Cape Canaveral National Seashore. He argued that the federal law requiring him to get a salvage permit unconstitutionally infringed on preexisting maritime salvage law. In finding against that claim, the Court held that "Congressional enactments restricting the manner in which a potential salvor excavates property located on federally owned or managed lands does not offend" the Constitution. *Lathrop*, 817 F. Supp. at 962.

This Court agrees. Common law principles do not automatically bar Congress from exercising its legislative prerogative to protect federal lands from potentially damaging activity.[5] And the requirement that a salvor act lawfully while salvaging does not offend admiralty law principles. *Id.* at 963. Other courts have upheld challenges to laws restricting salvage activities in national parks. *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel,*

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[5] *See* the Antiquities Act of 1906, prohibiting the appropriation of historic artifacts on federal land without a permit; the Rivers and Harbors Act of 1899, prohibiting excavation on federal land without a permit; and the Property Clause of the U.S. Constitution. U.S. Const., art. 4, § 3, cl. 2.

758 F.2d 1511 (11th Cir. 1985) (holding that salvager was not entitled to award for artifacts recovered from shipwreck in Biscayne National Park); *Craft v. National Park Serv.*, 34 F.3d 918 (9th Cir. 1994) (upholding fine against divers who used hammers and chisels to excavate a shipwreck located in a marine sanctuary). Neither maritime salvage law nor the common law of finds is a federal law within the meaning of the Sanctuaries Act. Thus, the Court finds that as a matter of law the Defendants were not engaged in an activity authorized by federal law when they salvaged in Coffins Patch in 1992. The Government is entitled summary judgment on this issue.

III. THE REMAINING ISSUES

The Government is not entitled to summary judgment on any other issue, as the Defendants have raised genuine issues of material fact on the amount of damage caused to seagrass in Coffins Patch, how much it will cost to repair any damage, who caused the damage, and whether removal of the artifacts damaged the historical value of the Florida Keys Sanctuary.

A. The Amount of Damage

The Government has provided reports and depositions from a number of scientists establishing that (1) "mailboxing" in Coffins Patch early in 1992 created several hundred blowholes and damaged at least 1.63 acres of seagrass; (2) it cost the Government $211,130 to respond to and assess this damage; (3) it would take 50 to 100 years to replace this seagrass; (4) the Government

cannot replant seagrass in the damaged areas; and (5) it will cost $351,648 to compensate for the Coffins Patch loss by restoring seagrass in a separate area of the Florida Keys Sanctuary. *See* Reports and Deposition Transcripts of Zieman, Kruer, McIntosh, Julius, Wright, and Fonseca.

The Defendants have provided reports and depositions from two scientists establishing that (1) damage to seagrass in Coffins Patch was minimal – far less than an acre; (2) blowholes in Coffins Patch could have been made prior to 1992; (3) there did not appear to be blowholes in areas where seagrass grows; (4) damage that Government scientists describe would take a maximum of twenty-five years to repair; and (5) it might be possible to replant seagrass in Coffins Patch. *See* Reports and Deposition Transcripts of Wanless and Thorhaug.

In addition, Kane Fisher has testified that he only used mailboxes and caused blowholes where there was sand and rubble on the ocean floor, not seagrass. Fisher also testified that he had been told that several people salvaged and created blowholes in Coffins Patch in 1990 and 1991, and that he saw those blowholes when he first arrived in 1992.

Because the Court must construe the evidence in a light most favorable to the non-moving party, the Court concludes that these conflicting scientific reports establish disputed issues of fact. Resolving them would require the Court to weigh conflicting evidence and make credibility determinations. This is inappropriate on a motion for summary judgment. *Mize*, 93 F.3d at 742. Therefore, the Court denies the Government's summary

judgment motion on the issues of damage to seagrass and the cost of repairing it.

B. Who Caused The Damage

It is undisputed that from January through March of 1992, the three Defendant boats salvaged in Coffins Patch. Ex. C. To Govt. Memo; K. Fisher Depo. Of May 2, 1995, at 22; Answer at ¶ 25; Def. Answer to Plaintiff's First Set of Interrogatories at 2(c). It is also established that the boats were working for Salvors, Inc., during this period. *Id.* Kane Fisher, operations manager of Salvors, directed the salvaging activities. K. Fisher Depo. of May 2, 1995, at 29-50, 69-81. Finally, the Defendants acknowledge that they used mailboxes to unearth buried treasure. *Id.* at 29-49.

However, there is a genuine issue of material fact as to whether the Defendants' mailboxing damaged seagrass. On one hand, Kane Fisher has acknowledged that no other salvors were working in Coffins Patch at the same time the Defendants were. *Id.* at 76. And Government scientists have consistently testified that when they examined Coffins Patch in the spring of 1992, they found freshly made blowholes. On the other hand, defense scientists say the holes they saw were old. And the Government has not disputed Kane Fisher's testimony that other salvors made blowholes in Coffins Patch in 1990 and 1991.

On this evidence, the Government has not established that the Defendants damaged seagrass in Coffins

Patch. At best, the Government has produced circumstantial evidence that the Defendants were responsible. However, making that determination requires weighing testimony and credibility, functions that are the province of the fact-finder. The Court therefore denies the Government's summary judgment motion on the issue of who caused seagrass damage in Coffins Patch.

C. Personal Liability of Mel and Kane Fisher

By the way it has styled and argued its case, the Government appears to be trying to hold Mel and Kane Fisher personally liable for any seagrass damage. As corporate officers acting on behalf of Salvors, Inc., the Fishers normally would be shielded from personal liability. While it is entirely proper for a court in an admiralty case to hold corporate officers personally liable,[6] the Government has not proved the facts necessary for this Court to hold that as a matter of law it should pierce the corporate veil.

In admiralty cases, the Court should apply federal common law to decide whether to pierce the corporate veil. *Talen's Landing, Inc., v. M/V Venture II*, 656 F.2d 1157, 1161 n.6 (5th Cir. 1981); *Hilton Oil Transp. v. Oil Transp. Co.*, 659 So.2d 1141, 1151 (Fla. 3d DCA 1995). This law provides general guidelines, although each case is distinct and must be determined on its own facts. *Talen's*

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[6] *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684 (1950); *Talen's Landing, Inc., v. M/V Venture II*, 656 F.2d 1157 (5th Cir. 1981); *Hilton Oil Transp. v. Oil Transp. Co.*, 659 So.2d 1141 (Fla. 3d DCA 1995).

Landing, 656 F.2d at 1161 n.6; *Hilton Oil*, 659 So.2d at 1151. The Court may apply Florida state law tenets as well. *Talen's Landing*, 656 F.2d at 1161 n.6; *Hilton Oil*, 659 So.2d at 1151.

Courts have used a number of factors in determining whether to hold corporate officers personally liable, including the absence of corporate formalities, inadequate capitalization, and use of corporate funds and facilities for personal rather than business purposes. Florida law contains a further requirement. The corporation must have been organized or operated for an improper or fraudulent purpose. *Dania Jai-Alai Palace, Inc., v. Sykes*, 450 So.2d 1114, 1120-21 (Fla. 1984).

The Government has not proved any of those factors. Regardless of whether Mel or Kane Fisher personally directed the salvaging operations in Coffins Patch, there remains a disputed issue of material fact on whether the Court should pierce the corporate veil and hold the Fishers personally liable. Accordingly, the Court denies the Government's motion on the grounds that the Fishers are liable for seagrass damage.

D. Historical Damage

The Government contends that the Defendants damaged the historical value of the Florida Keys Sanctuary by removing artifacts. According to the Government's argument, this removal caused the loss of valuable archaeological data that the Fishers could have obtained by better mapping and recording the location and condition of the artifacts before removing them.

As a threshold matter, removing artifacts from a national marine sanctuary can damage the sanctuary's historical resources. *See Craft*, 34 F.3d 918. But the Government has not shown that as a matter of law, the Defendants' actions in this case damaged the Florida Keys Sanctuary's historical resources. Both sides agree that the artifacts found in Coffins Patch have historical significance because of the ship(s) from which they came, and because of their location and condition in the water. Ex. A to Govt. Memo; Ex. 4 to Murphy Depo.; Murphy Depo. And the Government acknowledges that the Defendants have not damaged the artifacts. Murphy Report at 11.

The parties differ, however, on whether the Defendants took appropriate steps to safeguard the artifacts' archeological value. The Government has presented evidence that the Defendants did not do so. Ex. 4 to Murphy Depo. at 2-7; Ex. R to Govt. Memo. The Defendants have presented evidence showing that they had a proper archeological plan. Mathewson Depo. at 105-08. The Court cannot resolve such blatant factual disputes on summary judgment. Accordingly, it must deny the Government's motion on the grounds that as a matter of law, the Defendants are liable for damaging historical resources in the Florida Keys Sanctuary.

CONCLUSION

Because so many factual issues remain to be settled at trial, the Court cannot grant the Government's request for a permanent injunction at this time. For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Government's Motion for Summary Judgment (D.E. # 146) is **GRANTED** only on the grounds that the Government has established as a matter of law that the Defendants had no preexisting salvage rights in the Florida Keys Sanctuary. It is

FURTHER ORDERED AND ADJUDGED that the Government's Motion for Summary Judgment (D.E. # 146) is **DENIED** on all other issues and grounds.

DONE AND ORDERED in Chambers in Miami, Florida, this 30th day of April, 1997.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES
DISTRICT JUDGE

Copy:

Carolyn Zander
James Loften
Richard Rumrell
Michael Barnes
William Vandercreek

APPENDIX "F"

Findings of Fact and Conclusions of Law, July 30, 1997, *United States v. Fisher, et al.* (S.D. Fla. No. 91-10027-CIV-DAVIS) and *Motivations, Inc. v. Unidentified Wreck,* (S.D. Fla. No. 95-10051-CIV-DAVIS), 977 F.Supp. 1193 (S.D. Fla. 1997)

UNITED STATES of America, Plaintiff,

v.

Melvin A. FISHER, Kane Fisher, Salvors, Inc., a Florida corporation, M/V Bookmaker, M/V Dauntless, M/V Tropical Magic, their engines, apparel, tackle, appurtenances, stores, and cargo, in rem, Defendants.

MOTIVATION, INC., Plaintiff,

v.

UNIDENTIFIED, WRECKED AND ABANDONED SAILING VESSEL, etc., Defendant.

Nos. 92-10027-CIV, 95-10051-CIV.

United States District Court, S.D. Florida.

July 30, 1997.

James A. Lofton, Jon A. Mueller, U.S. Dept. of Justice, Environmental Enforcement Section, Washington, DC, Caroline M. Zander, U.S. Dept. of Justice, Gen. Litigation Section, Washington, DC, Lisa B. Hogan, Asst. U.S. Atty., Southern Dist. of Florida, Miami, FL, for Plaintiff.

William Vandercreek, Dallas, TX, for Mel Fisher.

Michael R. Barnes, Key West, FL, for Kane Fisher.

Richard G. Rumrell, Jacksonville, FL, for Motivation, Inc., Salvors, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

EDWARD B. DAVIS, Chief Judge.

This action stems from Defendants' 1992 treasure-hunting activities in the Florida Keys National Marine Sanctuary (the Keys Sanctuary). In Case Number 92-10027-CIV-DAVIS, the United States alleges that the Defendants illegally destroyed seagrass in the Keys Sanctuary and removed artifacts. The government seeks damages and an injunction under the Marine Protection, Research and Sanctuaries Act (the Sanctuaries Act). In 1995, Motivation, Inc.,[1] filed a separate action, seeking title to the same artifacts and a salvage award. *See* Case Number 95-10051-CIV-DAVIS.

On May 9, 1997, the Court dismissed the three vessels, the M/V Dauntless, the M/V Tropical Magic, and the M/V Bookmaker, as Defendants in Case Number 92-10027. The Court then tried this matter without a jury on May 12-13 and 19-21, 1997. At trial, the Court dismissed Melvin A. Fisher as a Defendant in Case Number 92-10027, then dismissed Case Number 95-10051 entirely. Therefore, the only remaining Defendants are Kane Fisher and Salvors, Inc. (collectively referred to below as "the Defendants").

Based on the evidence adduced at trial and pursuant to Federal Rule of Civil Procedure 52(a), the court enters the following Findings of Fact and Conclusions of Law.

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[1] Salvors, Inc., and Motivation, Inc., are related treasure-hunting companies that Defendants Melvin and Kane Fisher operate.

FINDINGS OF FACT[2]

A. Seagrass Damage

1. From January through March 1992, the M/V Dauntless, the M/V Tropical Magic, and the M/V Bookmaker conducted treasure-hunting operations in Atlantic Ocean waters off Grassy Key, Florida, known as Coffins Patch.

2. Coffins Patch is located within the boundaries of the Keys Sanctuary, a Congressionally-designated National Marine Sanctuary. The Keys Sanctuary is comprised of 2,800 square nautical miles of coral reef, seagrass, mangrove fringe shoreline and hard-bottom habitats that Congress designated for special protection in passing the Florida Keys National Marine Sanctuary Act (the Keys Act) in 1990.

3. Kane Fisher, an employee of Salvors, Inc., was captain of the M/V Dauntless and directed its treasure-hunting activities in Coffins Patch from January through March 1992. Fisher also directed the activities of the M/V Tropical Magic and the M/V Bookmaker during those three months. All three boats were in some capacity working for Salvors, Inc.

4. The three vessels were equipped with prop wash deflectors, also known as mailboxes, while operating in Coffins Patch. The mailboxes assisted in treasure hunting.

5. Mailboxes consist of a pair of large, angular pipes mounted on the transom of a vessel. Once lowered from

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[2] To the extent that any Findings of Fact represent legal conclusions, they are adopted as Conclusions of Law.

the transom, one end of each pipe fits directly over each of the vessel's propellers. The pipe turns at a ninety-degree angle and then aims straight down, directing the thrust of the ship's engines towards the sea bottom. The goal is to displace sediment and unearth buried items.

6. Mailboxes are powerful devices that can displace five feet of hard-packed mud in thirty-five feet of water. They also can excavate up to twenty-five feet of sand from the ocean bottom. They can make a hole in sand thirty feet across and three to four feet deep in fifteen seconds.

7. The water in Coffins Patch is very shallow, in many places only fifteen feet deep.

8. Using mailboxes, the Defendants made more than 600 holes in the Coffins Patch sea bottom during the first three months of 1992 while attempting to unearth artifacts. These holes are commonly referred to as blowholes. The mailboxes on the M/V Dauntless made 395 blowholes, and Kane Fisher personally ordered at least 300 of them to be dug.

9. The blowholes averaged twenty to thirty feet in diameter and three to five feet in depth, and extended along a line for more than a mile.

10. Bancroft Thorne is a Marathon dive boat operator who led ninety dive trips to Coffins Patch from 1987 through 1992. Thorne observed the M/V Dauntless, the M/V Tropical Magic, and the M/V Bookmaker using mailboxes in Coffins Patch on several occasions in January, February and March 1992. Neither he nor Kane

Fisher saw any other boats salvaging in Coffins Patch during those three months.[3]

11. The three vessels salvaged about 150 yards from where Thorne and his clients were diving. On several occasions, the mailboxes caused a large cloud of silt to wash over Thorne and his clients, reducing visibility to zero and forcing them to move dive locations.

12. On at least one occasion after this happened, and after the three vessels had left, Thorne and other divers swam over to the area where the boats had been working. Thorne saw numerous blowholes that he had not previously seen.

13. Kane Fisher placed spar buoys on the ocean surface to mark the site in Coffins Patch where he had salvaged for treasure. On March 23, 1992, Billy Causey, the Keys Sanctuary Superintendent, dove beneath one of the buoys in response to unconfirmed reports of damage to the ocean bottom. Causey counted nine blowholes on the sea bottom, all containing extensive seagrass damage.

14. Causey returned to the area on March 29, 1992, with video camera. He documented twenty-five blowholes up to nine feet deep. Causey believed the blowholes were made in the middle of seagrass beds because (1) all had dead seagrass in them, and (2) he found long seagrass blades exposed at the edges of the blowholes – the type of blades normally found in the middle of seagrass

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[3] Kane Fisher testified he observed several old blowholes in Coffins Patch when he first began digging there in January 1992, but saw no more than 10 on the first day and less than 100 during the entire time he salvaged there.

beds. Causey believed the holes were made during the previous month because rubble in and around them was stark white – the normal color of freshly exposed rubble. There was no algae growth that he would have expected to see on older rubble.

15. Harold Hudson, a Keys Sanctuary marine biologist, videotaped blowholes in Coffins Patch on April 4 and May 5-6, 1992. In May, Hudson and nine other divers video-taped seagrass damage in forty-one blowholes. Hudson documented large chunks of seagrass, some up to two feet thick, that had been ripped out and had fallen into the blowholes. He saw rubble and sediment on top of dead seagrass. Hudson believed the damage had occurred in the previous two months because fine sediment had settled on seagrass blades. If the damage had been older, that sediment would have washed off. Hudson described the seagrass damage as massive.

16. On April 25, 1992, Curtis Kruer, an environmental biologist, photographed about twenty-five blowholes in Coffins Patch, some up to six feet deep. Kruer observed hay-bale-sized chunks of seagrass lying in the blowholes, and up to three feet of sediment on top of dead seagrass.

17. Kruer believed the blowholes had been made no more than two months earlier because (1) sediment was still sitting on seagrass blades and (2) the coral rubble he observed was stark white. In addition, he believed the holes were man-made, rather than caused by tides and currents, because naturally caused craters are much shallower and not as steep as the blowholes he observed in Coffins Patch. There also had been no major storms in the

area that would have caused such severe natural erosion. The only similar damage that Kruer had seen was caused by bombs dropped from airplanes onto a bombing test range in waters near Puerto Rico.

18. Dr. Joseph Zieman is an environmental science professor at the University of Virginia who has spent his career studying seagrass. Zieman visited Coffins Patch in May 1992. He observed blowholes up to forty feet wide and ten feet deep, many of which contained an "incredible amount" of dead seagrass. He also saw hay-bale-sized chunks of dead seagrass. In thirty years of working with seagrass, Zieman had never seen such extensive damage.

19. Like other scientists, Zieman thought the holes had been made within the previous two months because the exposed coral rubble was still white. Like Kruer, he believed the holes were man-made, rather than natural, because of their symmetrical shape, depth, and steepness.

20. The March 1993 "Storm of the Century" brought gale force winds to the Florida Keys for thirty-six hours. The storm moved substantial material on the ocean bottom and filled in the Coffins Patch blowholes. Neither of the defense experts who testified at trial, Harold Wanless and Anitra Thorhaug, saw the Coffins Patch blowholes before the storm filled them in.

21. The blowholes that Defendants made damaged at least 1.63 acres of seagrass. This figure is based on Zieman's review of photographs taken of the damaged areas by McIntosh Marine in 1992, and a McIntosh Marine report calculating the damage based on (1) the

number of holes and (2) the percentage of sand to seagrass throughout the area. Using the same photos, Zieman independently calculated the damage and came up with the same figure as McIntosh Marine. Zieman did other damage calculations based on different sets of photographs, and concluded that the damage could have been as high as 3.3 acres. However, he concluded that based on the quality of the McIntosh Marine photos, 1.63 acres was an accurate, albeit conservative, damage estimate.

B. Restoration

22. The Coffins Patch area is swept by high-energy waves that keep bare sand areas in motion. This inhibits or limits seagrass recolonization in the area.

23. Natural recolonization in sandy areas of Coffins Patch is very slow. A full recovery of seagrass in the area where blowholes were made will take between 50 and 100 years.

24. The National Oceanic and Atmospheric Administration (NOAA) conducted a pilot project to determine if it could restore seagrass in the Coffins Patch damage tract by transplanting it. However, none of NOAA's seagrass transplants survived. There have been no successful transplants in other areas with wave energy similar to that in Coffins Patch.

25. The seagrass Defendants destroyed cannot be restored or replanted in the area of the blowholes.

26. In December 1996, NOAA conducted a survey to identify potential seagrass restoration projects in the

Keys Sanctuary that would be similar in scale and nature to the seagrass injuries in Coffins Patch. NOAA determined that the most viable off-site restoration project would be to transplant seagrass into boat-impacted areas which had later become no-motor zones (Prop Scar Restoration Project)

27. NOAA selected boat-impacted areas because they 1) are among natural seagrass beds, 2) represent a human-induced injury, 3) can be found in hydrodynamically protected areas, 4) present large-scale scarring that is not recovering, 5) have been restored in this geographic area and elsewhere, 6) occur in sufficient acreage, and 7) constitute an injury not unlike that found in Coffins Patch.

28. NOAA developed a restoration plan to implement the chosen project. The primary components of this plan include identifying methods of site marking, planting techniques, monitoring, and evaluating success.

29. NOAA determined the appropriate scale of the compensatory seagrass restoration project using an assessment methodology known as the Habitat Equivalency Analysis (HEA). The HEA quantifies the total resource services lost due to an injury. The HEA determines the quantity of equivalent habitat necessary to be restored and/or created, so that total resource services gained through restoration equals total resource services lost due to the injury. "Services" refers to functions that a resource performs for other resources or humans.

30. The HEA is appropriate to determine the scale of compensatory restoration projects when 1) the primary

category of lost on-site services pertains to the ecological/biological function of an area; 2) feasible restoration projects are available that provide services of the same type, quality, and comparable value to those that were lost; and 3) sufficient data on the required HEA input parameters exist and are cost effective to collect.

31. Since these three criteria were met in this case, the HFA is the most technically appropriate and cost-effective method to quantify the natural resource damage.

32. Based on an estimated 1.63 acres of damaged seagrass in Coffins Patch, NOAA calculated the total services lost due to the seagrass injury, the total services provided by the Prop Scar Restoration Project, and the total acreage of compensatory habitat required, so that total resource services gained were equivalent to total resource services lost.

33. An acre-year represents the total level of ecological services provided by one acre of seagrass over a single year. Using the HEA, NOAA calculated that 44.08 acre-years of services were lost due to the injury in Coffins Patch.

34. NOAA also used the HEA to calculate the scale of compensatory habitat necessary to compensate for the 44.08 acre-years of lost seagrass services. NOAA determined that 1.55 acres of seagrass habitat must be restored under the Prop Scar Restoration Project to compensate for the lost seagrass services.

35. NOAA has estimated the cost of implementing the 1.55-acre Prop Scar Restoration Project. The estimate includes the costs necessary to obtain aerial photographs

of selected sites, perform on-site "groundtruthing," collect and install seagrass planting units, obtain necessary permits, and monitor the project. The estimate includes expected labor, materials, and travel costs for each of these steps.

36. The total cost of implementing the Prop Scar Restoration Project is $351,648.

37. NOAA has incurred certain costs to respond and assess damage to sanctuary resources in this case. Those costs total $211,130. As of January 1997, $26,533 in interest had accrued on these costs.[4]

C. Artifacts

38. Contextual information is the relationship between artifacts and materials in an archeological site that provides patterns through which archeologists may make inferences about the past.

39. In widely scattered shallow water shipwrecks, a distinction may be drawn between primary cultural deposits, secondary scatter, and tertiary scatter.

40. The primary cultural deposit is the location where the ship itself has sunk to the bottom of the sea. In this area, a homogenous assemblage of artifacts remain closely associated to each other and contextual information is more likely to be found.

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[4] The parties have stipulated to the amount of response costs, damage assessment costs, and interest.

41. The secondary scatter of a site has less contextual information. It provides a good indication of where to look for the primary cultural deposit, as well as the rest of the site.

42. The tertiary scatter has even less contextual information to offer. Artifacts are scattered over a wide area. The tertiary site may be miles away from the primary cultural deposit.

43. The Defendants excavated and recovered a number of artifacts from the sea bottom in Coffins Patch in the course of their treasure-hunting activities. These artifacts were recorded on a Conservation Lab Artifact Report.

44. Based on the vessel logs completed during the excavation and recovery, Defendants' activities took place within a tertiary scatter, as Defendants were trying to identify whether a site existed in a particular area of Coffins Patch.

45. Accordingly, the Court concludes that little, if any, contextual information was lost in the course of Defendants' treasure-hunting activities in Coffins Patch.[5]

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[5] The United States argues contextual information was lost because Defendants did not record sufficient information about the artifacts during their treasure-hunting activities. The United States contends it is entitled to $68,445 to conduct a scientifically performed analysis of the impacted site and restore part of the lost contextual information.

CONCLUSIONS OF LAW[6]

A. The Statutory Scheme

1. Congress enacted the Sanctuaries Act in response to "a growing concern about the increasing degradation of marine habitats." S.Rep. No. 595, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 4387.

2. The Sanctuaries Act provides for the protection of important and sensitive marine areas through the establishment of marine sanctuaries. The purpose of the sanctuaries is to preserve sensitive areas for their conservation, recreational, ecological, or aesthetic value. *Id.*; 16 U.S.C. § 1431. Under the Act, the Secretary of Commerce may designate and manage marine sanctuaries. 16 U.S.C. § 1433. The Secretary has delegated those responsibilities to NOAA.

3. The Sanctuaries Act imposes strict liability on "any person who destroys, causes the loss of, or injures any sanctuary resource." 16 U.S.C. § 1443; *United States v. M/V. Miss Beholden*, 856 F.Supp. 668, 670 (S.D.Fla.1994). The Secretary of Commerce may seek damages from and injunctions against anyone who destroys or injures sanctuary resources. 16 U.S.C. §§ 1437 and 1443. A person may avoid liability under Section 1443 only if he can show that the damage was (1) caused by an act of God, an act of war, or the act or omission of a third party, (2) caused by an activity authorized by federal or state law, or (3) negligible. 16 U.S.C. § 1443(a)(1) and (3).

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[6] To the extent that any Conclusions of Law represent factual findings, they are adopted as Findings of Fact.

4. The Sanctuaries Act broadly defines "sanctuary resource" as "any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

5. Congress also may designate sanctuaries, as it did in 1990 when it passed the Keys Act. Pub.L. No. 101-605, 104 Stat. 3089 (1990). The Keys Act provides that the Secretary of Commerce shall manage and police the Keys Sanctuary under the Sanctuaries Act. Keys Act § 5(a). Hence, anyone damaging Keys Sanctuary resources is liable to the government in the manner described in 16 U.S.C. § 1443. *Id.*

B. Seagrass Damage

6. Among the Congressional findings in the Keys Act were that "spectacular, unique and nationally significant marine environments, including seagrass meadows," need protection through establishment of a marine sanctuary. *Id.* at § 2(2).

7. Seagrass is distributed in significant amounts along the Florida coast, and, in particular, the Florida Keys. It stabilizes the sea bottom and helps prevent erosion. It provides a habitat and a refuge for numerous small invertebrates, fish, and other organisms. It serves as an important base in the food chain. It helps recycle nutrients into ocean water.

8. The Court finds that seagrass is a resource within the meaning of both the Keys Act and the Sanctuaries

Act. *See United States v. Fisher*, 22 F.3d 262, 265-66 (11th Cir.1994). Therefore, anyone who destroys or harms seagrass is strictly liable to the United States for damages unless that person has a defense under 16 U.S.C. § 1443(a)(1) or (3).

9. The Court also finds that Defendants injured and destroyed 1.63 acres of seagrass by using mailboxes to salvage for treasure in Coffins Patch in January, February, and March 1992. The evidence that supports this finding is:

a. Testimony from Kane Fisher and vessel logs indicating that mailboxes on the three boats made more than 600 blowholes in Coffins Patch during the first three months of 1992.

b. Testimony from Kane Fisher and Bancroft Thorne that no other salvagers were digging for treasure in Coffins Patch during that time.

c. Testimony from Bancroft Thorne that despite consistently running dive operations in Coffins Patch from 1987 through 1992, he never saw blowholes of the type at issue in this case until after Kane Fisher and the three boats left the area.

d. Testimony from Billy Causey that on March 23, 1992, he discovered blowholes with seagrass damage directly below a surface buoy left by Kane Fisher to mark the spot where he had salvaged in Coffins Patch.

e. Testimony from Billy Causey, Harold Hudson, Curtis Kruer, and Joseph Zieman that the blowholes they saw in Coffins Patch in March, April, and May 1992 had been made within the previous two months because (1) the exposed

coral rubble was white and not fouled by algae, and (2) sediment remained on seagrass blades.

f. Testimony from Billy Causey, Harold Hudson, Curtis Kruer, and Joseph Zieman that the freshly made blowholes they observed had been made in the middle of seagrass beds because of the amount of displaced seagrass and the length of the blades of the remaining seagrass.

g. Testimony from Curtis Kruer and Joseph Zieman that the blowholes they observed had not been caused by nature because the holes were more symmetrical, steep, and deep than naturally caused craters.

h. Testimony from Joseph Zieman and the report of McIntosh Marine indicating that the blowholes damaged at least 1.63 acres of seagrass.

i. Testimony from Harold Wanless and Anitra Thorhaug that they did not view the area in question until after the March 1993 "Storm of the Century" had filled in the blowholes. Because the government's expert witnesses had an opportunity to view the damage before that storm, the Court finds their testimony on the nature and scope of the damage more credible than that of Wanless or Thorhaug.

10. For the same reasons as listed in Paragraph 9, the Court finds that the damage in question was not (1) caused by an act of God, an act of war, or the act or omission of a third party,[7] (2) caused by an activity

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[7] Specifically, the Court rejects the Defendants' arguments that either prior salvage operations or nature made the blowholes and caused the seagrass damage.

authorized by federal or state law,[8] or (3) negligible. As a result, none of the liability exceptions listed in 16 U.S.C. § 1443 apply here.

11. Therefore, the Court finds that Defendants are liable to the United States under 16 U.S.C. § 1443(a)(1) for response costs and damages resulting from the destruction, loss, or injury of a Keys Sanctuary resource.

C. Seagrass Restoration

12. Specifically, the United States is entitled to compensation for (1) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource, and (2) the value of the lost use of a sanctuary resource pending its restoration or replacement, or the acquisition of an equivalent sanctuary resource. 16 U.S.C. § 1432(6)(A).

13. Because the destroyed seagrass at Coffins Patch cannot be restored or replaced, the public must be compensated by the acquisition of an equivalent sanctuary resource. In order to compensate for the seagrass losses at Coffins Patch, a seagrass restoration project must be performed at another suitable location within the Sanctuary.

14. The Prop Scar Restoration Project developed by NOAA will provide seagrass services equivalent to those lost due to the injuries Defendants caused.

15. The HEA is an appropriate methodology to scale the compensatory restoration project chosen by NOAA in this case.

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[8] The Court ruled on this issue in its Summary Judgment Order of April 30, 1997.

16. According to the HEA, 1.55 acres of seagrass habitat must be restored under the Prop Scar Restoration Project to compensate for the interim services that will be lost at Coffins Patch as a result of Defendants' actions.

17. The estimated cost of implementing the Prop Scar Restoration Project – totaling $351,648 – is reasonable and appropriate. Accordingly, the United States is entitled to $351,648 from Defendants to implement the Prop Scar Restoration Project.

18. Under the Sanctuaries Act, the United States is also entitled to recover the cost of response and damage assessment. 16 U.S.C. §§ 1432(6)(C) & (7). Therefore, the United States shall recover assessment and response costs in the amount of $211,130 from the Defendants.

19. The United States is also entitled to recover interest on these assessment and response costs. 16 U.S.C. § 1443(a)(1)(B). Accordingly, the United States shall recover $26,533 in interest accrued on NOAA's assessment and response costs.

D. Removal of Artifacts

20. The Court finds that the artifacts Defendants recovered from Coffins Patch in 1992 are a sanctuary resource within the meaning of § 1432(8), as they are nonliving resources that contribute to the historical value of the sanctuary.

21. By removing these artifacts from the Sanctuary, Defendants caused the loss of sanctuary resources. 16 U.S.C. § 1443(a)(1)(A)

22. Therefore, under the Sanctuaries Act, the United States is entitled to recover these artifacts. 16 U.S.C. § 1432(6).

23. This Court finds, however, that the United States is not entitled to receive compensation to professionally evaluate or curate the artifacts.[9]

24. The Court also concludes that the amount of archeological contextual information lost during Defendants' treasure-hunting activities was negligible. 16 U.S.C. § 1443(a)(3)(C). Accordingly, the Court also declines to award compensation for loss of contextual archeological information.

E. Injunctive Relief

25. The Sanctuaries Act empowers district courts to enjoin violations of the Act. 16 U.S.C. § 1437(i).

26. On July 23, 1992, this Court granted a preliminary injunction restraining the Defendants from using prop wash deflectors in the Keys Sanctuary. The Eleventh Circuit affirmed this Order. *United States v. Fisher*, 22 F.3d 262 (11th Cir.1994).

27. The standard for entry of a permanent injunction essentially mirrors that of a preliminary injunction, except the plaintiff must show actual success on the

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[9] The United States argues that, but for Defendants' activities, NOAA would not be forced to incur these costs. Accordingly, the United States contends it is entitled to $6,385 under 16 U.S.C. § 1432(6)(A)(i)(I). The Court is not persuaded that the statute entitles the United States to this relief.

merits rather than likelihood of success. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12, 94 L.Ed.2d 542 (1987). In addition to success on the merits, a plaintiff must prove that it will suffer irreparable harm if the injunction is not granted, that the threatened injury outweighs the harm that granting the injunction would inflict on the defendant, and that the public interest will not be adversely affected if an injunction is granted. *In re Daytona Beach Gen. Hosp.*, 153 B.R. 947, 950 (Bkrtcy.M.D.Fla.1993).

28. By proving that the Defendants destroyed and lost sanctuary resources, the United States has established success on the merits.

29. The United States has also established that it will suffer irreparable harm if the injunction is not granted. The Court has found that Defendants' treasure-hunting activities in Coffins Patch in 1992, in particular their use of mailboxes, resulted in damage to and loss of Keys Sanctuary resources. Evidence at trial established that regrowth of seagrass damaged and destroyed by mailboxes will take 50 to 100 years. Allowing Defendants to continue to use mailboxes and remove artifacts would likely cause further, irreparable damage to Sanctuary resources.[10]

30. The scale and significance of the harm Defendants' treasure-hunting activities caused outweighs any burden placed on the Defendants.

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[10] This activity is now regulated by NOAA through the issuance of permits. *See* 15 C.F.R. §§ 922.163 and 922.166.

31. The public interest will not be adversely affected if this injunction is granted. Rather, the public interest will be served by the protection of Sanctuary resources.

32. Accordingly, Defendants are permanently enjoined from using mailboxes and removing artifacts from the Keys Sanctuary without a permit issued by NOAA.[11]

33. The United States shall file a proposed final judgment within ten days from the date stamped on this Order.

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[11] The Court reminds Defendants that, in addition to complying with this Court order, they are required to follow the law as stated in the Sanctuaries Act and its regulations.

APPENDIX "G"

Judgment, September 3, 1997, *United States v. Fisher, et al.* (S.D. Fla. Nos. 91-10027-CIV-DAVIS) and *Motivations, Inc. v. Unidentified Wreck,* (S.D. Fla. No. 95-10051-CIV-DAVIS)

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. KANE FISHER, and SALVORS, INC., Defendant. _____/	CASE NO. 92-10027-CIV-DAVIS CASE NO. 95-10051-CIV-DAVIS MAGISTRATE JUDGE GARBER **JUDGMENT** (Filed Sep. 3, 1997)

THIS MATTER is before the Court on its own initiative. This action was tried to the Court on May 12-13 and 19-22, 1997. The Court, by separate order dated July 30, 1997, issued its Findings of Fact and Conclusions of Law. As there are no justiciable issues remaining, this matter is ready to proceed to final judgment. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff United States of America shall recover of Defendants Kane Fisher and Salvors, Inc., jointly and severally, the following amounts:

(1) $211,130 for responses and assessment costs incurred by the United States;

(2) $26,533 in interest on those response and assessment costs from January 31, 1997; and

(3) $351,648 to implement a compensatory seagrass restoration project to compensate the public for seagrass injuries. It is

FURTHER ORDERED AND ADJUDGED that the Defendants are permanently enjoined from (a) using prop wash deflectors or "mailboxes" in the Florida Keys National Marine Sanctuary and (b) removing artifacts from the Florida Keys National Marine Sanctuary, both without a valid permit issued by the National Oceanic and Atmospheric Administration (NOAA). It is

FURTHER ORDERED AND ADJUDGED that the Defendants shall return all artifacts that are the subject of this action which they recovered from the Florida Keys National Marine Sanctuary in 1992 to NOAA. The Defendants shall return all such artifacts to NOAA, including those that may have been transferred to third parties, at a location in Key West, Florida to be designated by NOAA within sixty (60) days of the date stamped on this Judgment unless NOAA agrees in writing to a delay. The Defendants are directed to contact opposing counsel to coordinate an orderly transfer of the artifacts. In returning the artifacts to NOAA, the Defendants shall ensure that the artifacts are handled and cared for in such a manner that will ensure their conservation and integrity. It is

FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction to enforce this Judgment and award costs, if any. It is

FURTHER ORDERED AND ADJUDGED that for administrative and statistical purposes, the Clerk's Office shall **CLOSE THIS CASE**. All pending motions not otherwise addressed are **DENIED AS MOOT.**

DONE AND ORDERED in Chambers in Miami, Florida, this 3rd day of ~~August,~~ Sept. 1997.

/s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES
DISTRICT JUDGE

Copy: James Lofton
Jon Mueller
Caroline Zander
Michael Barnes
William VanDercreek
Richard Rumrell

APPENDIX "H"

Order Denying Petition for Rehearing, July 8, 1999, *United States v. Fisher, et al.* and *Motivation, Inc. v. Unidentified Wreck* (11th Cir. No. 97-5800)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5800

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN A. FISHER, M/V BOOKMAKER, M/V DAUNTLESS, M/V TROPICAL MAGIC, their engines, apparel, tackle, appurtenances, stores and cargo, in rem,

Defendants-Appellants,

MOTIVATION, INC. a Delaware Corporation,

Plaintiff-Counter Defendant-Appellant,

versus

UNIDENTIFIED, WRECKED AND ABANDONED VESSEL, her tackle, armament, apparel and cargo located in the Atlantic Ocean within a circle with a radius of 1,000 yards of a point located at 24 41'30" North Latitude and 080 56'18" West Longitude,

Defendant.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Jul. 08, 1999)

BEFORE: EDMONDSON, COX and BIRCH, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by the appellants is denied.

ENTERED FOR THE COURT.

/s/ E.R. Cox
UNITED STATES
CIRCUIT JUDGE

William VanDercreek
Attorney at Law
P.O. Box 1328, 215 S. Monroe St., Level P-3
Tallahassee FL 32302

July 08, 1999

RE: 97-5800 -AA USA v. Fisher
DC DKT NO.: 92-10027 CIV-EBD

TO: Carlos Juenke MIAMI
CC: Richard G. Rumrell
CC: William VanDercreek
CC: Michael Richard Barnes
CC: Andrew C. Mergen
CC: John A. Bryson
CC: Barbara Klearman Bisno
CC: Lisa B. Hogan
CC: Administrative File

APPENDIX "I"

The Florida Keys National Marine Sanctuary and Protection Act, 104 Stat. 3089 (1990)

PUBLIC LAW 101-605-NOV. 16, 1990
104 STAT. 3089

Public Law 101-605
101st Congress

An Act

To establish the Florida Keys National Marine Sanctuary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled.

SHORT TITLE

SECTION 1. This Act may be cited as the "Florida Keys National Marine Sanctuary and Protection Act".

FINDINGS

SEC. 2. The Congress finds and declares the following:

(1) The Florida Keys extend approximately 220 miles southwest from the southern tip of the Florida peninsula.

(2) Adjacent to the Florida Keys land mass are located spectacular, unique, and nationally significant marine environments, including seagrass meadows, mangrove islands, and extensive living coral reefs.

(3) These marine environments support rich biological communities possessing extensive conservation, recreational, commercial, ecological, historical, research, educational, and esthetic values which give this area special national significance.

(4) These environments are the marine equivalent of tropical rain forests in that they support high levels of biological diversity, are fragile and easily susceptible to damage from human activities, and possess high value to human beings if properly conserved.

(5) These marine environments are subject to damage and loss of their ecological integrity from a variety of sources of disturbance.

(6) Vessel groundings along the reefs of the Florida Keys represent one of many serious threats to the continued vitality of the marine environments of the Florida Keys which must be addressed in order to protect their values.

(7) Action is necessary to provide comprehensive protection for these marine environments by establishing a Florida Keys National Marine Sanctuary, by restricting vessel traffic within such Sanctuary, and by requiring promulgation of a management plan and regulations to protect Sanctuary resources.

(8) The agencies of the United States must cooperate fully to achieve the necessary protection of Sanctuary resources.

(9) The Federal government and the State of Florida should jointly develop and implement a comprehensive program to reduce pollution in the waters offshore the Florida Keys to protect and restore the water quality, coral reefs, and other living marine resources of the Florida Keys environment.

POLICY AND PURPOSE

SEC. 3. (a) POLICY. – It is the policy of the United States to protect and preserve living and other resources of the Florida Keys marine environment.

(b) PURPOSE. – The purpose of this Act is to protect the resources of the area described in section 5(b), to educate and interpret for the public regarding the Florida Keys marine environment, and to manage such human uses of the Sanctuary consistent with this Act. Nothing in this Act is intended to restrict activities that do not cause an adverse effect to the resources or property of the Sanctuary or that do not pose harm to users of the Sanctuary.

DEFINITION

SEC. 4. As used in this Act, the term "adverse effect" means any factor, force, or action that would independently or cumulatively damage, diminish, degrade, impair, destroy, or otherwise harm –

(1) any Sanctuary resource, as defined in section 302(8) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432(8)); or

(2) any of those qualities, values, or purposes for which the Sanctuary is designated.

SANCTUARY DESIGNATION

SEC. 5. (a) DESIGNATION. – The area described in subsection (b) is designated as the Florida Keys National

Marine Sanctuary (in this Act referred to as the "Sanctuary") under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.). The Sanctuary shall be managed and regulations enforced under all applicable provisions of such title III as if the Sanctuary had been designated under such title.

(b) AREA INCLUDED. – (1) Subject to subsections (c) and (d), the area referred to in subsection (a) consists of submerged lands and waters, including living marine and other resources within and on those lands and waters, from the mean high water mark to the boundary described under paragraph (2), with the exception of areas within the Fort Jefferson National Monument. The Sanctuary shall be generally identified and depicted on National Oceanic and Atmospheric Administration charts FKNMS 1 and 2, which shall be maintained on file and kept available for public examination during regular business hours at the Office of Ocean and Coastal Resource Management of the National Oceanic and Atmospheric Administration and which shall be updated to reflect boundary modifications under this section.

(2) The boundary referred to in paragraph (1) –

(A) begins at the northeasternmost point of Biscayne National Park located at approximately 25 degrees 39 minutes north latitude, 80 degrees 5 minutes west longitude, then runs eastward to the 300-foot isobath located at aproximately [sic] 25 degrees 39 minutes north latitude, 80 degrees 4 minutes west longitude;

(B) then runs southward and connects in succession the points at the following coordinates:

(i) 25 degrees 34 minutes north latitude, 80 degrees 4 minutes west longitude,

(ii) 25 degrees 28 minutes north latitude, 80 degrees 5 minutes west longitude, and

(iii) 25 degrees 21 minutes north latitude, 80 degrees 7 minutes west longitude;

(C) then runs southward to the northeastern corner of the existing Key Largo National Marine Sanctuary located at 25 degrees 16 minutes north latitude, 80 degrees 8 minutes west longitude;

(D) then runs southwesterly approximating the 300-foot isobath and connects in succession the points at the following coordinates:

(i) 25 degrees 7 minutes north latitude, 80 degrees 13 minutes west longitude,

(ii) 24 degrees 57 minutes north latitude, 80 degrees 21 minutes west longitude,

(iii) 24 degrees 39 minutes north latitude, 80 degrees 52 minutes west longitude,

(iv) 24 degrees 30 minutes north latitude, 81 degrees 23 minutes west longitude,

(v) 24 degrees 25 minutes north latitude, 81 degrees 50 minutes west longitude,

(vi) 24 degrees 22 minutes north latitude, 82 degrees 48 minutes west longitude,

(vii) 24 degrees 37 minutes north latitude, 83 degrees 6 minutes west longitude,

(viii) 24 degrees 40 minutes north latitude, 83 degrees 6 minutes west longitude,

(ix) 24 degrees 46 minutes north latitude, 82 degrees 54 minutes west longitude,

(x) 24 degrees 44 minutes north latitude, 81 degrees 55 minutes west longitude,

(xi) 24 degrees 51 minutes north latitude, 81 degrees 26 minutes west longitude;

(xii) 24 degrees 55 minutes north latitude, 80 degrees 56 minutes west longitude;

(E) then follow the boundary of Everglades National Park in a southerly then northeasterly direction through Florida Bay, Buttonwood Sound, Tarpon Basin, and Blackwater Sound;

(F) after Division Point, then departs from the boundary of Everglades National Park and follows the western shoreline of Manatee Bay, Barnes Sound, and Card Sound;

(G) then follows the southern boundary of Biscayne National Park and the northern boundary of Key Largo National Marine Sanctuary to the southeasternmost point of Biscayne National Park; and

(H) then follows the eastern boundary of the Biscayne National Park to the beginning point specified in subparagraph (A).

(c) AREAS WITHIN STATE OF FLORIDA. – The designation under subsection (a) shall not take effect for any area located within the waters of the State of Florida if, not later than 45 days after the date of enactment of this Act, the Governor of the State of Florida objects in writing to the Secretary of Commerce.

(d) BOUNDARY MODIFICATIONS. – No later than the issuance of the draft environmental impact statement for the Sanctuary under section 304(a)(1)(C)(vii) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434(a)(1)(C)(vii)), in consultation with the Governor of the State of Florida, if appropriate, the Secretary of Commerce may make minor modifications to the boundaries of the Sanctuary as necessary to properly protect Sanctuary resources. The Secretary of Commerce shall submit to the Committee on Commerce, Science, and Transportation of the Senate and Committee on Merchant Marine and Fisheries of the House of Representatives a written notification of such modifications. Any boundary modification made under this subsection shall be reflected on the charts referred to in subsection(b)(1).

PROHIBITION OF CERTAIN USES

SEC. 6 (a) VESSEL TRAFFIC. – (1) Consistent with generally recognized principles of international law, a person may not operate a tank vessel (as that term is defined in section 2101 of title 46, United States Code) or a vessel greater than 50 meters in length in the Area To Be

Avoided described in the Federal Register notice of May 9, 1990 (55 Fed. Reg. 19418-19419).

(2) The prohibition in paragraph (1) shall not apply to necessary operations of public vessels. For the purposes of this paragraph, necessary operations of public vessels shall include operations essential for national defense, law enforcement, and responses to emergencies that threaten life, property, or the environment.

(3) The provisions of paragraphs (1) and (2), including the area in which vessel operations are prohibited under paragraph (1), may be modified by regulations issued jointly by the Secretary of the department in which the Coast Guard is operating and the Secretary of Commerce.

(4) This subsection shall be effective on the earliest of the following:

(A) the date that is six months after the date of enactment of this Act.

(B) the date of publication of a notice to mariners consistent with this section, or

(C) the date of publication of new nautical charts consistent with this section.

(b) MINERAL AND HYDROCARBON LEASING, EXPLORATION, DEVELOPMENT, AND PRODUCTION. – No leasing, exploration, development, or production of minerals or hydrocarbons shall be permitted within the Sanctuary.

COMPREHENSIVE MANAGEMENT PLAN

SEC. 7. (a) PREPARATION OF PLAN. – The Secretary of Commerce, in consultation with appropriate Federal, State, and local government authorities and with the Advisory Council established under section 208, shall develop a comprehensive management plan and implementing regulations to achieve the policy and purpose of this Act. The Secretary of Commerce shall complete such comprehensive management plan and final regulations for the Sanctuary no later than 30 months after the date of enactment of this Act. In developing the plan and regulations, the Secretary of Commerce shall follow the procedures specified in sections 303 and 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1433 and 1434), except those procedures requiring the delineation of Sanctuary boundaries and development of a resource assessment report. Such comprehensive management plan shall –

(1) facilitate all public and private uses of the Sanctuary consistent with the primary objective of Sanctuary resource protection;

(2) consider temporal and geographical zoning, to ensure protection of Sanctuary resources;

(3) incorporate regulations necessary to enforce the elements of the comprehensive water quality protection program developed under section 8 unless the Secretary of Commerce determines that such program does not meet the purpose for which the Sanctuary is designated or is otherwise inconsistent or incompatible with the comprehensive management plan developed under this section;

(4) identify needs for research and establish a long-term ecological monitoring program;

(5) identify alternative sources of funding needed to fully implement the plan's provisions and supplement appropriations under section 9 of this Act and section 313 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1444).

(6) ensure coordination and cooperation between Sanctuary managers and other Federal, State, and local authorities with jurisdiction within or adjacent to the Sanctuary;

(7) promote education, among users of the Sanctuary, about coral reef conservation and navigational safety; and

(8) incorporate the existing Looe Key and Key Largo National Marine Sanctuaries into the Florida Keys National Marine Sanctuary except the Looe Key and Key Largo Sanctuaries shall continue to be operated until completion of the comprehensive management plan for the Florida Keys Sanctuary.

(b) PUBLIC PARTICIPATION. – The Secretary of Commerce shall provide for participation by the general public in development of the comprehensive management plan.

(c) TERMINATION OF STUDIES. – On the date of enactment of this Act, all congressionally mandated studies of existing areas in the Florida Keys for designation as National Marine Sanctuaries shall be terminated.

FLORIDA KEYS WATER QUALITY

SEC. 8. (a) WATER QUALITY PROTECTION PROGRAM. – (1) Not later than 18 months after the date of enactment of this Act, the Administrator of the Environmental Protection Agency and the Governor of the State of Florida, in consultation with the Secretary of Commerce, shall develop a comprehensive water quality protection program for the Sanctuary. If the Secretary of Commerce determines that such comprehensive water quality protection program does not meet the purpose for which the Sanctuary is designated or is otherwise inconsistent or incompatible with the comprehensive management plan prepared under section 7, such water quality program shall not be included in the comprehensive management plan. The purposes of such water quality program shall be to –

(A) recommend priority corrective actions and compliance schedules addressing point and nonpoint sources of pollution to restore and maintain the chemical, physical, and biological integrity of the Sanctuary, including restoration and maintenance of a balanced, indigenous population of corals, shellfish, fish and wildlife, and recreational activities in and on the water; and

(B) assign responsibilities for the implementation of the program among the Governor, the Secretary of Commerce, and the Administrator in accordance with applicable Federal and State laws.

(2) The program required by paragraph (1) shall, under applicable Federal and State laws, provide for

measures to achieve the purposes described under paragraph (1), including –

(A) adoption or revision, under applicable Federal and State laws, by the State and the Administrator of applicable water quality standards for the Sanctuary, based on water quality criteria which may utilize biological monitoring or assessment methods, to assure protection and restoration of the water quality, coral reefs, and other living marine resources of the Sanctuary;

(B) adoption under applicable Federal and State laws of enforceable pollution control measures (including water quality/based effluent limitations and best management practices) and methods to eliminate or reduce pollution from point and nonpoint sources;

(C) establishment of a comprehensive water quality monitoring program to (i) determine the sources of pollution causing or contributing to existing or anticipated pollution problems in the Sanctuary, (ii) evaluate the effectiveness of efforts to reduce or eliminate those sources of pollution, and (iii) evaluate progress toward achieving and maintaining water quality standards and toward protecting and restoring the coral reefs and other living marine resources of the Sanctuary;

(D) provision of adequate opportunity for public participation in all aspects of developing and implementing the program; and

(E) identification of funding for implementation of the program, including appropriate Federal and State cost sharing arrangements.

(b) COMPLIANCE AND ENFORCEMENT. – The Administrator of the Environmental Protection Agency, the Secretary of Commerce, and the Governor of the State of Florida shall ensure compliance with the program required by this section, consistent with applicable Federal and State laws.

(c) CONSULTATION. – In the development and implementation of the program required by paragraph (1), appropriate State and local government officials shall be consulted.

ADVISORY COUNCIL

SEC. 9. (a) ESTABLISHMENT. – The Secretary of Commerce, in consultation with the Governor of the State of Florida and the Board of County Commissioners of Monroe County, Florida, shall establish an Advisory Council to assist the Secretary in the development and implementation of the comprehensive management plan for the Sanctuary.

(b) MEMBERSHIP. – Members of the Advisory Council may be appointed from among (1) Sanctuary managers, (2) members of other government agencies with overlapping management responsibilities for the Florida Keys marine environment, and (3) representatives of local industries, commercial users, conservation groups, the marine scientific and educational community, recreational user groups, or the general public.

(c) EXPENSES. – Members of the Advisory Council shall not be paid compensation for their service as members and shall not be reimbursed for actual and necessary

traveling and subsistence expenses incurred by them in the performance of their duties as such members.

(d) ADMINISTRATION. – The Advisory Council shall elect a chairperson and may establish subcommittees, and adopt by-laws, rules, and such other administrative requirements and procedures as are necessary for the administration of its functions.

(e) STAFFING AND OTHER ASSISTANCE. – The Secretary of Commerce shall make available to the Advisory Council such staff, information, and administrative services and assistance as the Secretary of Commerce determines are reasonably required to enable the Advisory Council to carry out its functions.

AUTHORIZATION OF APPROPRIATIONS

SEC. 10. (a) AUTHORIZATION FOR SECRETARY OF COMMERCE. – Section 313(2)(C) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1444(2)(C)) is amended by striking "$3,000,000" and inserting in lieu thereof "$4,000,000".

(b) AUTHORIZATION FOR EPA ADMINISTRATOR. – There are authorized to be appropriated to the Administrator of the Environmental Protection Agency $750,000 for each of the fiscal years 1991 and 1992.

(c) REPORT. – The Secretary of Commerce shall, not later than March 1, 1991, submit to the Committee on Commerce Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the future requirements for funding the Sanctuary through fiscal year 1999

under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 14321 et seq.)

Approved November 16, 1990.

APPENDIX "J"

Marine Sanctuaries – Procedures for Designation and Implementation, 16 U.S.C. § 1434 (1996 as amended)

16 USC Sec. 1434. Marine Sanctuaries – Procedures for designation and implementation

(a) Sanctuary proposal

(1) Notice

In proposing to designate a national marine Sanctuary, the Secretary shall –

(A) issue, in the Federal Register, a notice of the proposal, proposed regulations that may be necessary and reasonable to implement the proposal, and a summary of the draft management plan;

(B) provide notice of the proposal in newspapers of general circulation or electronic media in the communities that may be affected by the proposal; and

(C) on the same day the notice required by subparagraph (A) is issued, the Secretary shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate documents, including an executive summary, consisting of –

(i) the terms of the proposed designation;

(ii) the basis of the findings made under section 1433(a) of this title with respect to the area;

(iii) an assessment of the considerations under section 1433(b)(1) of this title;

(iv) proposed mechanisms to coordinate existing regulatory and management authorities within the area;

(v) the draft management plan detailing the proposed goals and objectives, management responsibilities, resource studies, interpretive and educational programs, and enforcement, including surveillance activities for the area;

(vi) an estimate of the annual cost of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education;

(vii) the draft environmental impact statement;

(viii) an evaluation of the advantages of cooperative State and Federal management if all or part of a proposed marine sanctuary is within the territorial limits of any State or is superjacent to the subsoil and seabed within the seaward boundary of a State, as that boundary is established under the Submerged Lands Act (43 U.S.C. 1301 et seq.); and

(ix) the proposed regulations referred to in subparagraph (A).

(2) Environmental impact statement

The Secretary shall –

(A) prepare a draft environmental impact statement, as provided by the

National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), on the proposal that includes the resource assessment report required under section 1433(b)(3) of this title, maps depicting the boundaries of the proposed designated area, and the existing and potential uses and resources of the area; and

(B) make copies of the draft environmental impact statement available to the public.

(3) Public hearing

No sooner than thirty days after issuing a notice under this subsection, the Secretary shall hold at least one public hearing in the coastal area or areas that will be most affected by the proposed designation of the area as a national marine sanctuary for the purpose of receiving the views of interested parties.

(4) Terms of designation

The terms of designation of a sanctuary shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics. The terms of designation may be modified only by the same procedures by which the original designation is made.

(5) Fishing regulations

The Secretary shall provide the appropriate Regional Fishery Management council with the

opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary to implement the proposed designation. Draft regulations prepared by the Council, or a council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, makes a determination which is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations. The Secretary shall also cooperate with other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practicable stage in drafting any sanctuary fishing regulations.

(6) Committee action

After receiving the documents under subsection (a)(1)(C) of this section, the Committee on Merchant Marine and Fisheries of the House

of Representatives and the Committee on Commerce, Science, and Transportation of the Senate may each hold hearings on the proposed designation and on the matters set forth in the documents. If within the forty-five day period of continuous session of Congress beginning on the date of submission of the documents, either Committee issues a report concerning matters addressed in the documents, the Secretary shall consider this report before publishing a notice to designate the national marine sanctuary.

(b) Taking effect of designations

(1) Notice

In designating a national marine sanctuary, the Secretary shall publish in the Federal Register notice of the designation together with final regulations to implement the designation and any other matters required by law, and submit such notice to the Congress. The Secretary shall advise the public of the availability of the final management plan and the final environmental impact statement with respect to such sanctuary. The Secretary shall issue a notice of designation with respect to a proposed national marine sanctuary site not later than 30 months after the date a notice declaring the site to be an active candidate for sanctuary designation is published in the Federal Register under regulations issued under this Act, or shall publish not later than such date in the Federal Register findings regarding why such notice has not been published. No notice of designation may occur until the expiration of the period for Committee action under subsection (a)(6) of this section. The designation (and any of its terms not disapproved under this subsection) and regulations

shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on the day on which such notice is published unless, in the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.

(2) Withdrawal of designation

If the Secretary considers that actions taken under Paragraph (1) will affect the designation of a national marine sanctuary in a manner that the goals and objectives of the sanctuary cannot be fulfilled, the Secretary may withdraw the entire designation. If the Secretary does not withdraw the designation, only those terms of the designation not certified under paragraph (1) shall take effect.

(3) Procedures

In computing the forty-five day periods of continuous session of Congress pursuant to subsection (a)(6) of this section and paragraph (1) of this subsection –

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain are excluded.

(c) Access and valid rights

(1) Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.

(2) The exercise of a lease, permit, license, or right is subject to regulation by the Secretary consistent with the purposes for which the sanctuary is designated.

(d) Interagency cooperation

(1) Review of agency actions

(A) In general

Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary.

(B) Agency statements required

Subject to any regulations the Secretary may establish each Federal agency proposing an action described in subparagraph (A) shall provide the Secretary with a written statement describing the action and its potential effects on sanctuary resources at the earliest practicable time, but in no case later than 45 days before the final approval of the action unless such Federal agency and the Secretary agree to a different schedule.

(2) Secretary's recommended alternatives

If the Secretary finds that a Federal agency action is likely to destroy, cause the loss of, or injure a sanctuary resource, the Secretary shall (within 45 days of receipt of complete information on the proposed agency action) recommend reasonable and prudent alternatives, which may include conduct of the action elsewhere, which can be taken by the Federal agency in implementing the agency action that will protect sanctuary resources.

(3) Response to recommendations

The agency head who receives the Secretary's recommended alternatives under paragraph (2) shall promptly consult with the Secretary on the alternatives. If the agency head decides not to follow the alternatives, the agency head shall provide the Secretary with a written statement explaining the reasons for that decision.

(e) Review of management plans

Not more than five years after the date of designation of any national marine sanctuary, and thereafter at intervals not exceeding five years, the Secretary shall evaluate the substantive progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques, and shall revise the management plan and regulations as necessary to fulfill the purposes and policies of this chapter.

-SOURCE-

(Pub. L. 92-532, title III, Sec. 304, Oct. 23, 1972, 86 Stat. 1063; Pub. L. 94-62, Sec. 4, July 25, 1975, 89 Stat. 303; Pub. L. 94-326. Sec. 4, June 30, 1976, 90 Stat. 725; Pub. L. 95-153, Sec. 3, Nov. 4, 1977, 91 Stat. 1255; Pub. L. 96-332, Sec. 3, Aug. 29, 1980, 94 Stat. 1059; Pub. L. 97-109, Dec. 26, 1981, 95 Stat. 1512; Pub. L. 98-498, title I, Sec. 102, Oct. 19, 1984, 98 Stat. 2298; Pub. L. 100-627, title II, Sec. 202, Nov. 7, 1988, 102 Stat. 3214; Pub. L. 102-587, title II, sec. 2104, Nov. 4, 1992, 106 Stat. 5041; Pub. L. 104-283, Sec. 9(h), Oct. 11, 1996, 110 Stat. 3368.)

Supreme Court, U.S.
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No. 99-594

In The Supreme Court Of The United States

KANE FISHER AND SALVORS, INC., et al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

Amicus Curiae Brief in Support of Petition by Southeastern Fisheries Association, Inc. and Monroe County Commercial Fishermen

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit,

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30pp

QUESTIONS PRESENTED

I.

Whether the admiralty right to salvage, and other user rights, are automatically invalidated upon the designation of a National Marine Sanctuary by Congress prior to the subsequent promulgation of rules and regulations for approval by Congress, and when applicable the State, that will govern the sanctuary and salvage activities upon taking effect?

II.

Whether a right of maritime salvage constitutes a federal law within the meaning of 16 U.S.C. § 1443 providing a "person may avoid liability" for injury to the sanctuary "caused by an activity authorized by federal or state law"?

AMICUS CURIAE LIST OF PARTIES

Amicus Curiae parties are Southeastern Fisheries Association, Inc. and Monroe County Commercial Fishermen. There are no parent companies or subsidiary companies.

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I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. Leave to file *Amicus Curiae* Brief Granted by Parties

Counsel for the Petitioners and the Solicitor General for the Respondent have consented pursuant to Supreme Court Rule 37 for the Southeast Fisheries and Monroe County Commercial Fishermen to file an *Amicus Curiae* Brief in Support of the Petition.

B. Interest of *Amicus Curiae*

This Brief in Support is filed on behalf of the two fishermen groups representing ninety percent (90%) of the commercial fishermen operating in the Florida Keys National Marine Sanctuary. Sixty-five percent (65%) of the Sanctuary is within the State of Florida. The livelihood of the fishermen, indeed the viability of the Keys fishing industry, is dependent upon fair and reasonable rules and regulations for the Florida Keys Sanctuary.

The critical Question Presented directly concerns fishermen and others who use the Sanctuary for their livelihood. *Whether proposed rules and regulations for the Florida Keys Sanctuary, after prior opportunity for public input, must be submitted to Congress and to Florida for consideration and possible objection before implementation of the Sanctuary may take effect.* The opportunity for input concerning proposed rules and the review by Congress and Florida is of life or death importance to the fishermen's economic existence.

The Florida Keys Sanctuary was designated by an act of Congress on November 16, 1990. The implementation of

rules and regulations for the Sanctuary to take effect occurred on July 1, 1997. 62 F.R. 32154 (June 12, 1997); 62 F.R. 36655 (July 9, 1997). During this interval substantial activity by all segments of users occurred in the area encompassed by the proposed Sanctuary. This activity included not only Petitioner Kane Fisher's salvage efforts in 1992, but also even more substantial activity by commercial fishermen and numerous other business or pleasure entities. The concerns of commercial fishermen and other Sanctuary users were addressed at numerous public hearings prior to the promulgation of rules. See discussion of NOAA's public representation, *infra* pp. 7-11.

Florida's objections accepted by NOAA included the Protocol for Cooperative Fisheries Management. 62 F.R. 32156. The existing regulations are subject to future changes and modifications. By virtue of the Eleventh Circuit ruling and NOAA's representations to the Eleventh Circuit (that submission of proposed rules is not required for implementation of the Sanctuary), the questioned right of public input and right of Florida to review and to object to future changes continues to be a matter of substantial importance.

C. Eleventh Circuit's Ruling and NOAA's Position Contradicts Purpose of Act for Public Input Prior to Implementation

The determinative issue is the nature and requirement under the Keys Sanctuary Act Section 7 for submission of proposed rules, after opportunity for public input, to Congress and the State of Florida for the Sanctuary to take effect under 16 U.S.C. § 1434(b). The Eleventh Circuit in its opinion affirming preliminary injunction in 1994 expressly ruled that because the Sanctuary had been designated by Congress, instead of the Secretary of Commerce, there is no requirement to submit proposed rules to Congress and to Florida for "implementation"

of the Sanctuary to "take effect." *United States v. Fisher, et al.*, 22 F.3d 262, 267-269 (11th Cir. 1994). This ruling was based upon NOAA's representation of regulatory expertise in interpreting the federal statute.

Notwithstanding NOAA's representation to the Eleventh Circuit on the preliminary injunction appeal, NOAA did exactly the opposite by submitting proposed rules in accordance with Section 7(a) of the Act to Congress and to the State of Florida and then making changes in accordance with Florida's objections. 62 F.R. 32154 (June 12, 1997). The Federal Register excerpts recognize that implementation did **not** "take effect" until July 1, 1997 and not the date found by the Eleventh Circuit of November 16, 1990, when the Keys Sanctuary Act was signed. (See Appendix 1, *infra.*) What is even more amazing, NOAA continued to advise the Eleventh Circuit in 1998, on appeal of the Final Judgment, that there was no obligation to submit proposed rules. NOAA asserted that the rules only had been submitted as an accommodation. (See portions of NOAA's 1998 Eleventh Circuit Brief in Appendix 2, *infra.*)

Recognizing their zeal to win and duty of vigorous representation, government counsel still should be held to at least a fair standard of candor and integrity in representations to the courts. This is particularly true in this case because of the judicial deference accorded government counsel and their "regulatory expertise in statutory interpretation." As a result of this judicial deference, the Eleventh Circuit by its 1999 per curiam affirmance awarded the articles of salvage to NOAA and upheld $600,000 in damages that occurred prior to the effective date of any rule or regulation. This result perpetuated the ruling that submission of proposed rules is not required by the Keys Act.

The Eleventh Circuit's ruling contravenes not only the terms of the 1990 Florida Keys Sanctuary Act and the provisions of the 1997 rules and regulations, it also produces an apparent absurdity of reasoning: If maritime salvage, otherwise lawful, was made per se illegal by the mere passage of the Keys Sanctuary Act, it would follow that anyone who took a fish (a Sanctuary resource) between 1990 and 1997 also violated the Act.

This absurdity, however, is not far fetched. NOAA had considered regulations proposing "virtually closing down commercial and recreation fishing and prohibiting many other recreational uses."[1] This proposal was rejected in favor of a more moderate approach to gain public support for the Sanctuary. This underscores the importance of public input and the approval process by Congress and Florida. It further underscores due process principles of why enforcement must follow and not precede approval of rules.

There would be no absurdity, however, if the Sanctuary Act and the subsequent rules and regulations are fairly, properly and, indeed, literally applied. Review by this Court is needed to secure the right by Sanctuary users, including salvors, fishermen and others, for input and further protection through review by Congress and Florida.

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[1] Strategy for Stewardship, Florida Keys National Marine Sanctuary, Final Management Plan: An Overview, p. 2 (1996).

D. Sanctuary Act – Right of Public Input – Approval and Implementation

It would be difficult to draft a statute and rules and regulations that could be more clear in respect to users' rights and date of implementation. This is best demonstrated by looking at the statute and rules. Section 7(a) of the Florida Keys Sanctuary Act states "[I]n developing the plan and regulations, the Secretary of Commerce shall follow the procedures" of 16 U.S.C. § 1434(b). This procedure unequivocally requires submission to Congress and, when applicable, to the State before implementation of the Sanctuary may take effect. The rules and regulations published in the Federal Register expressly acknowledge that they were submitted in accordance with § 1434(b). [Section 304 of the 1972 National Marine Sanctuary Act] (See Appendix 1, *infra*.) The right of Florida to object was recognized and accepted. The rules and regulations proclaimed that they took effect on July 1, 1997. Section 922.167 acknowledged that the relevant time for determining prior use is July 1, 1997, the date of implementation of the Sanctuary, not November 16, 1990, the date of passage of the Sanctuary Act.[2]

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[2] § 922.167(a)(1)

(a) A person may conduct an activity prohibited by §§922.163 or 922.164 if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on July 1, 1997, or by any valid right of subsistence use or access in existence on July 1, 1997, provided that:

(1) The holder of such authorization or right notifies the Director, in writing, within 90 days of July 1, 1997, of the existence of such authorization or right and requests certification of such authorization or right.

The Act and rules recognize prior existing use activity, not otherwise unlawful, may continue until modified or otherwise restricted by the implementation of rules and regulations.[3] Prior to Sanctuary implementation parties are subject to all existing laws. Thus, if the salvage in question had occurred within the boundaries of the Dry Tortugas National Park (an area surrounded but excluded from the Keys Sanctuary)[4] penalties and sanctions for violations of the Archeological Resources Protection Act could be imposed under 16 U.S.C. § 470(b)(b).

The fishing industry in Florida is extensively regulated by various federal and state laws. If fishing activity prior to implementation occurred within the proposed boundaries of the Sanctuary violated any existing law and regulation, appropriate penalties could be applied. Sanctions and penalties under the Sanctuary Act, 16 U.S.C. §§ 1443 and 1447, however, would not be applicable until implementation of the Sanctuary (July 1, 1997). Any violation by fishermen or salvors after the July 1, 1997 effective date would, of course, subject the violator to penalties under the Sanctuary statutes.[5]

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[3] 16 U.S.C. § 1434(c); see also Florida Keys National Marine Sanctuary Act, §§7(a)(1) and 7(b); 62 F.R. 32154, 32161 (June 12, 1997). See also § 922.166.

[4] 15 CFR § 922.161, 62 F.R. 32161 (June 12, 1997).

[5] The Petitioners (Fisher, et al.) position appears to be in the alternative. No claim exists under 16 U.S.C. § 1443 and § 1447 because implementation of the Keys Sanctuary did not take effect until after the salvage activity had ended, and if the Sanctuary is deemed implemented as of the date of the Act, no liability exists under § 1443 because maritime salvage was an activity authorized by federal law that had not been otherwise restricted or barred at the time and place in question.

The Eleventh Circuit's ruling (based upon NOAA's arguments) that designation by Congress constitutes implementation of the Sanctuary is directly contrary to NOAA's pronouncement in the Federal Register. The Secretary still must "implement designated sanctuaries":

> The authority of the Secretary to designate national marine sanctuaries and implement designated sanctuaries was delegated to the Under Secretary of Commerce for Oceans and Atmosphere . . .

62 F.R. 32154 (June 12, 1997).[6]

The only support for the Eleventh Circuit's opinion (that submission of proposed rules to Congress and to Florida is not required by the Keys Sanctuary Act) is the self-proclaimed expertise of NOAA in statutory interpretation. This expertise, at least in reference to the Keys Act, would seem to be repudiated completely by NOAA's double standard in submitting proposed rules and regulations governing activity after July 1, 1997. These rules do constitute federal law.

NOAA also has taken an entirely different position with the public than with the Eleventh Circuit. The government's (NOAA's) successful duplicity is well documented by its own publications:

> The National Marine Sanctuaries Act (NMSA) and the Florida Keys National Marine Sanctuary and Protection Act of 1990 (FKNMSPA) mandate the development of a

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[6] See also 16 U.S.C. § 1433(a):

(a) The Secretary may designate any discrete area of the marine environment as a national marine sanctuary and **promulgate regulations implementing the designation** if the Secretary— (emphasis added)

comprehensive management plan that protects Sanctuary resources and facilitates Sanctuary uses that are compatible with the primary objective of resource protection.[7]

* * *

During the lengthy public review process for the DMP/EIS, NOAA received over 6,414 written and verbal comments on the draft plan and has given those comments full consideration in developing the FMP/EIS. In addition, the Sanctuary Advisory Council commented on the draft plan. Those comments have been given considerable weight in the development of the Final Plan.[8]

* * *

There has never been a more public process in the development of a management plan in the history of National Marine Sanctuaries. Literally thousands of individuals and organizations have contributed and commented on various aspects of this plan. In a bottoms-up planning process, a Sanctuary Advisory Council consisting of 22 stakeholders, agency representatives, and citizens worked diligently with Sanctuary staff and an Interagency Core Group to develop this final plan. The process took thousands of people hours to complete and is unparalleled in scope

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[7] Florida Keys National Marine Sanctuary, Final Management Plan/ Environmental Impact Statement, Vol. I of III, p. 9, U.S.Gov't. Printing Office, 1996, 755-004/45001A

[8] *Ibid.*

> regarding public participation at the State and local level.[9]

The Eleventh Circuit's ruling (urged by NOAA) stands in stark contrast with the reality of what NOAA was telling the public, that public input and Florida's approval are essential. The Eleventh Circuit, echoing NOAA's representation to the Court, stated:

> There is a sound practical reason why, in the Florida Keys Act, Congress designated the Florida Keys Sanctuary effective immediately and did not delay the effectiveness of the designation for a stated period, as it did in sanctuaries designated by the Secretary under the Sanctuaries Act. In the latter situation, the 45-day delay of the taking effect of the Secretary's designation was designed to give Congress the Opportunity disapprove 'any of [the designations] terms,' (16 U.S.C. § 1434(b)) and the public the opportunity to make its views known. Where, however, Congress itself made the designation, there was no need or occasion for such delay. The public already has had the opportunity to comment upon the legislation while it was pending before Congress, and Congress fully considered the terms of the designation before the Act was enacted.

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[9] Strategy for Stewardship, Florida Keys National Marine Sanctuary, Final Management Plan: An Overview, p. 2 (1996).

> Although the Florida Keys Act requires the Secretary to develop, with public participation, a management plan for the Florida Keys Sanctuary, there was no reason for Congress itself to review that plan after the statute became effective, and no indication that Congress reserved the right. Indeed, in view of the Congressional concern over effectively protecting the Florida Keys Sanctuary that led Congress in the Florida Keys Act itself to create the sanctuary, it is difficult to believe that Congress would have delayed implementation of the sanctuary for the 30 months the Secretary had to promulgate a management plan. This 30-month period stands in sharp contrast to the 45 days that Congress has to review and possibly disapprove the Secretary's designation of a sanctuary under the Sanctuaries Act.

United States v. Fisher, et al., 22 F.3d 262, 267 -268.

In its 1996 publication efforts to gain public acceptance and Florida's approval, NOAA's answer to a supposed question (drafted by NOAA) is exactly opposite what it told to the Eleventh Circuit and what the Eleventh Circuit held:

> Question #6: While these REGULATIONS appear to be reasonable, I am concerned that more restrictive regulations will be put in place in the future.
>
> Answer: Sanctuary Managers have very limited authority to unilaterally establish regulations. Except for restricted access to a limited area in the event of an emergency, all changes to Sanctuary regulations will require much the same process as the development of

> this final plan including public notice and comment before a change can occur. Even emergency closures will require consultation with the Governor who will have the ability to appeal closures in state waters.[10]

Review by this Court is needed. The destruction by the Eleventh Circuit of the vital right of the public, including salvors and fishermen, to provide public input should not be allowed to stand. The right of public input would be without protection if NOAA's submission of rules and regulations to Congress and to Florida were permissive instead of being mandatory. The equally important right of salvors, fishermen and other users to have notice of what is and what is not proscribed would seem mandated by fundamental principles of due process.

The Petitioners were not charged with violation of any promulgated rule or regulation of the Florida Keys Sanctuary. What is frightening from the perspective of fairness and due process is that by virtue of the mere passage of the Keys Sanctuary Act prior to its implementation, and without any violation of the Act's terms, Petitioners were fined and their salvage ordered confiscated. If NOAA can do this to one user, it can do so to others as it chooses. When a governmental agency is not adhering to principles of rules of law, the only recourse under our governmental system is through the judicial branch.

The Eleventh Circuit opinion has spawned conflicting and inconsistent positions and understandings, creating uncertainty of important rights. Even if a neutral observer would characterize the government's (NOAA's) arguments to the Eleventh Circuit as untenable, inexcusable, or ridiculous, this is of no moment. The Eleventh Circuit has accepted and

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[10] *Id.* at 23.

endorsed the argument. The Eleventh Circuit's view is of great moment to not only federal courts exercising jurisdiction over the Sanctuary but also to all past and future users – fishermen and salvors included.

Only this Court can protect this public interest by proclaiming that the Florida Keys Sanctuary Act mandates submission of proposed rules and regulations, with opportunity for public input, before implementation takes effect. In the United States "law" is considered a restriction on previously unrestricted rights. In other nations "law" is often a grant of a restricted license from all the powers held by the sovereign government. Congress authorized no restriction on previously unrestricted rights in the Florida Keys Sanctuary without State of Florida and congressional review of proposed rules and regulations. It *is* that simple.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Rules and Regulations, Department of Commerce, 62 FR 32154

62 FR 32154-01

1997 WL 311295 (F.R.)
(Cite as: 62 FR 32154)

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Parts 922, 929, and 937

[Docket No. 9607292-6192-03]

RIN 0648-AD85

Florida Keys National Marine Sanctuary Final Regulations

Thursday, June 12, 1997

***32154** AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of effective date; modifications to final rule.

SUMMARY: Pursuant to the Florida Keys National Marine Sanctuary and Protection Act and the National Marine Sanctuaries Act, NOAA developed the comprehensive final management plan for the Florida Keys National Marine Sanctuary (FKNMS or the Sanctuary). NOAA issued final regulations on January 30, 1997, to implement that plan and govern the conduct of activities within the Sanctuary. Congress

and the Governor of the State of Florida (Governor) had forty-five days of continuous session of Congress beginning on the day on which the final regulations were published to review those regulations and management plan. After the forty-five day review period, the regulations would become final and take effect, except that any term or terms of the regulations or management plan the Governor certified to the Secretary of Commerce as unacceptable would not take effect in the area of the Sanctuary lying within the seaward boundary of the State.

During the forty-five day review period the Governor submitted to the Secretary of Commerce a certification that implementation of the management plan and certain regulations were unacceptable unless specific amendments were made to the regulations. In response to the Governor's certification, NOAA amended those regulations certified as unacceptable to incorporate the Governor's changes. Consequently, upon their effective date the regulations, as modified by this notice, and management plan, in their entirety, will apply throughout the Sanctuary, including within State waters of the Sanctuary.

This notice amends the regulations published in the January 30, 1997, Federal Register, in response to the Governor's certification, and announces the effective date of the regulations.

EFFECTIVE DATE: The final rule published on January 30, 1997, at 62 FR 4578 and the revision of 15 CFR part 922, subpart P in this document are effective July 1, 1997.

ADDRESSES: Requests for a copy of the FMP/EIS, the Final Regulatory Flexibility Analysis, or the Federalism Assessment should be submitted to the Sanctuary Superintendent, Florida Keys National Marine Sanctuary, P.O. Box 500368, Marathon, Florida 33050.

FOR FURTHER INFORMATION CONTACT: Billy Causey, Sanctuary Superintendent, 305/743-2437 or Edward Lindelof, East Coast Branch Chief, Sanctuaries and Reserves Division, 301/713-3137 Extension 131.

SUPPLEMENTARY INFORMATION:

I. Introduction

The FKNMS was designated by an act of Congress entitled the Florida Keys National Marine Sanctuary and Protection Act (FKNMSPA, Pub.L. 101-605) which was signed into law on November 16, 1990. The FKNMSPA directed the Secretary of Commerce to develop a comprehensive management plan and regulations for the Sanctuary pursuant to sections 303 and 304 of the National Marine Sanctuaries Act (NMSA) (also known as Title III of the Marine Protection, Research, and Sanctuaries Act of 1972), as amended, 16 U.S.C. 1431 et seq. The NMSA authorizes the development of management plans and regulations for national marine sanctuaries to protect their conservation, recreational, ecological, historical, research, educational, or aesthetic qualities.

The authority of the Secretary to designate national marine sanctuaries and implement designated sanctuaries was delegated to the Under Secretary of Commerce for Oceans and Atmosphere by the Department of Commerce, Organization Order 10-15, s3.01(z) (Jan. 11, 1988). The authority to administer the other provisions of the NMSA was delegated to the Assistant Administrator for Ocean Services and Coastal Zone Management of NOAA by NOAA Circular 83-38, Directive 05-50 (Sept. 21, 1983, as amended).

II. Forty-Five Day Review Period Under the National Marine Sanctuaries Act

NOAA published the final Sanctuary regulations on January 30, 1997, (62 FR 4578) to implement the management plan and govern the conduct of activities within the Sanctuary. Under the NMSA, Congress and the Governor had forty-five days of continuous session of Congress beginning on the day on which the final regulations were published to review the terms of designation (i.e., management plan and regulations). After forty-five days, the regulations would become final and take effect, except that any term or terms the Governor certified within the forty-five day period to the Secretary of Commerce as unacceptable would not take effect in the area of the Sanctuary lying within the seaward boundary of the State. Congress could also act on the terms of designation. The following discusses the Governor and Congress' actions during the forty- five day period and corresponding modifications to the final regulations made by NOAA in response to those actions.

Certification by the Governor of Florida

On March 20, 1997, during the forty-five day review period under the NMSA, the Governor of the State of Florida certified by letter to the Secretary of Commerce that implementation of the management plan and certain regulations were unacceptable in State waters. However, the management plan and regulations certified as unacceptable would be acceptable if NOAA amended the regulations and the Co-Trustees Agreement for Cooperative Management (Co- Trustees Agreement), contained in the management plan, as requested in the Governor's certification letter. NOAA has amended the regulations and the Co- Trustees Agreement to incorporate the modifications requested by the Governor in his letter. By doing so, the regulations and management plan, as modified, are accepted